83-1448

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEATRAIN LINES, INC., and
J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

—against—

JOHN CARCICH, PASQUALE INTRONA
and VINCENZA INTRONA,

Respondents.

PETITION OF SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD. FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Petitioners

WALKER & CORSA
Of Counsel

I

QUESTIONS PRESENTED FOR REVIEW

1. (a) In a Title 33 U.S.C. § 905(b) personal injury action brought by longshoremen employed by an independent contractor, can the vessel, having warned the stevedore of a potential hazard which the stevedore ignored, be liable because it should have anticipated that its warning might not be heeded?

   (b) In such a case, where the factual issue is whether there was a dangerous condition and/or whether the vessel's warning was adequate, does this Court's decision in *Scindia Steam Navigation Co. Inc.* v. *De Los Santos* 451 U.S. 156 (1981) require that the jury be instructed that the scope of the vessel's duty is a function of its reasonable reliance on the expertise of the stevedore?

2. (a) In such action, was petitioner Seatrain Inc., the owner of the terminal, similarly entitled, as "the vessel" within the meaning of Title 33, U.S.C. § 902(21), to a charge qualifying its duty to respondents by its reasonable reliance on the stevedore to heed the warning which Seatrain Inc. had passed on to the stevedore in the form of a stowage plan?

   (b) Alternatively, if Seatrain was not "the vessel," was the jury properly charged that Seatrain had the obligation to itself heed the warning and to itself make such further inquiry, if any were required, as would have been done by a competent stevedore in the exercise of reasonable care?

3. In an action brought in state court pursuant to Title 33 U.S.C. § 905(b), does this Court's decision in *Norfolk and Western Ry. Co.* v. *Liepelt* 444 U.S. 490 (1980) control; and must a state court trial judge allow proof of tax liability in diminution of a claim of lost wages?

4. If the charge on the issue of the liability of either the shipowner or terminal owner or if the exclusion of proof of tax liability was in material error and a violation of applicable federal law, must the judgment of the Supreme Court of the State of New York, New York County awarding respondents damages totalling $3,100,000 be vacated, and a new trial ordered on the issues of liability and damages?

5. Did respondents prove at trial negligence on the part of either the terminal owner or the shipowner under the applicable federal law; and should this Court remand the case for entry of judgment in petitioners' favor?

II

PARTIES TO THE PROCEEDING NOT LISTED IN CAPTION

Catherine Carcich, plaintiff

Hudson Waterways Corporation, defendant

Scarsdale Shipping Co. Ltd., defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION OF SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD.* FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

DECISIONS BELOW

The decision of the Supreme Court, New York County entered February 14, 1983 denying petitioners' motion pursuant to the Civil Practice Laws & Rules of the State of New York ("C.P.L.R.") § 4404 is unreported and is reprinted here at Appendix "B ". The order of the Supreme Court of the State of New York, Appellate Division-First Department entered June 28, 1983 affirming the Supreme Court judgment without opinion is reprinted at Appendix "C." The order of the Supreme Court, Appellate Division-First Department denying without opinion petitioners' motion for reargument or permission to appeal to the New York Court of Appeals pursuant to C.P.L.R. § 5602, entered September 22, 1983, is here annexed as Appendix "D". The order of the New York Court of Appeals denying without opinion petitioners' renewed motion for leave to appeal entered December 1, 1983 is reprinted in Appendix "E".

JURISDICTION

Petitioners seek review of the decision of the Supreme Court of the State of New York, Appellate Division-First Department entered June 28, 1983 affirming the judgment of the Supreme Court, New York County entered July 30, 1982. Petitioners sought leave to appeal to the New York Court of Appeals pursuant to the two-step procedure provided for in C.P.L.R.

---

* Listing of petitioners' parent companies, subsidiaries and affiliates pursuant to Supreme Court Rule 28.1 is at Appendix "F".

§ 5602. The Appellate Division denied leave to appeal by order entered September 22, 1983. The Court of Appeals denied leave to appeal by order entered December 1, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

33 U.S.C. § 902(21)

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 905(b)

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

46 CFR § 146.02-17

§ 146.02-17 *Handling and stowage of cargo.*

Explosives or other dangerous articles or substances as cargo shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty. For vessels engaged in voyages coastwise, or on rivers, bays, sounds or lakes, including the Great Lakes when the voyage is not foreign-going, such person may be an employee of the vessel owner or charterer and so assigned by said owner or charterer or he may be a licensed officer attached to the vessel and assigned by the master of the vessel. For domestic vessels engaged in voyages foreign-going or intercoastal such persons shall be an officer possessing an unexpired license issued by the U.S. Coast Guard and assigned to such duty by the owner, charterer, agent or master of the vessel. For foreign vessels such person shall be an officer of the vessel assigned to such duty by the master of the vessel.

STATEMENT OF THE CASE

This petition seeks review of an affirmance by the New York Supreme Court, Appellate Division-First Department of a final judgment awarding damages totalling $3,100,000 which was entered July 30, 1982 after an 18 day jury trial of this longshoremen's personal injury case in New York County Supreme Court before the Honorable Edward J. Greenfield, Justice. The issue in this case of petitioners' liability to respondents is controlled by federal law which, with respect to the liability of "the vessel" in a Title 33 USC § 905(b) suit by longshoremen, was addressed by this Court in *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156 (1981). At trial, petitioners requested that the jury be instructed in accordance with the principles enunciated in *Scindia, supra*. (The relevant portions of petitioners' Requests to Charge are at Appendix "G". But the question of petitioners' fault was tried

and the jury charged without reference to federal law and as if the law of the State of New York were controlling, with all questions of relevance of evidence and jury instruction treated as whether, by the "reasonable man" test, the petitioners ought to have done more in order to have prevented respondents' injuries which, were in fact, caused by gross negligence of their employer. The trial court's charge is reproduced in relevant part at Appendix "H".

This suit was brought by two former longshoremen[1] to recover on account of personal injuries sustained April 19, 1976 aboard M/S ASIALINER, an ocean-going container vessel[2] of British Registry, operated by petitioner J.&J. Denholm Management Ltd. ("Denholm" or "vessel operator"). At the time, the vessel was moored to a Weehawken, New Jersey pier which was part of a container terminal (now defunct) once owned by petitioner Seatrain Lines, Inc. ("Seatrain" or "terminal owner").

At the time of the accident, respondents were employed as members of a 16 man gang supervised by a foreman or, in waterfront parlance, a "hatch boss" whose name was Arthur Mitchell [1800-1A][3]. The gang and its hatch boss were employed by United Terminals Inc. ("United Terminals" or "stevedore")[4] an independent contractor hired by Seatrain to

---

1 The suit, as the caption reflects, also resulted in judgment (for $100,000) in favor of one of the longshoreman's wives, Vincenza Introna, for loss of consortium. For simplicity, "respondents" will refer to John Carcich and Pasquale Introna, the two longshoremen.

2 Containers are rectangular cargo boxes serviceable as truck trailer bodies. They are always 8 feet wide and are usually 8 feet high. As far as is relevant to this case they are either 40 or 20 feet long and whatever their length are always carried and transported with their long axis horizontal.

3 References followed by "A" are to pages in the Appendix filed with the New York Supreme Court, Appellate Division-First Department. References followed by "a" are to pages in the Appendices reprinted in this Petition.

4 "Stevedore" will refer only to an employer of longshoremen.

load and discharge those container vessels calling at the Weehawken Terminal which were engaged in a so-called "liner" service[5]. On April 19, 1976, the M/S ASIALINER, one of at least three other vessels so employed, was moored to the terminal "finger" pier which extended into the water in a generally east-west direction. The vessel was on the pier's north side [143A], portside-to, bow-in [221A] and was being discharged by the stevedore by means of an overhead gantry crane belonging to Seatrain but operated (as was always the case) by a United Terminals employee, one Walter Slapkowski ("Slapkowski" or "crane operator").

The injuries to respondents occurred at 11:30 P.M. [20A] during discharge of containers carried underdecks in the vessel's No. 10, bay "No. 4" container cell [147-150A]. At the time, only longshoremen were out on deck anywhere near the vicinity of the occurrence. The ship's officer, who had visited briefly, was last seen about one-half hour earlier [239A] when the hatch covers at the bay were removed at the beginning of discharge. Hatch Boss Mitchell was on the dock [297A, 1843A] and his assistant, "Jimmy" Blendano had left the area before the accident, apparently leaving respondent, Carcich in charge [2237-8A].

The crane was operated from a cab located aloft which "trollied" back and forth from a position directly above the cell aboard ship from which a container was to be lifted to a position over the dock where a (truck) tractor pulling a trailer or "chassis" was awaiting. To lift the container the crane operator lowered a lifting device, a so-called "spreader," attached by cables to the crane's boom, over the container after the cab and spreader had been trollied out over the ship. This spreader was 40 feet long, 8 feet wide and was fitted with devices at its four corners designed to lock into the four corner castings on the upper surface of *one* container of like dimension stowed aboard ship.

---

5 Such service offers regularly scheduled sailings on a more or less frequent basis.

The spreader was 40 feet long and was fitted with four locking devices because 95% of the containers carried aboard ship in this liner service were of that length [218A]. It was an integral part of the crane and was not replaced in the event of handling of the remaining 5% of cargo carried aboard liner service vessels—containers 20 feet long having the same 8 foot width as those of twice that length. Instead, during handling of 20 foot containers the spreader was adapted, for purposes of lifting these containers one at a time, with four wires and a like number of twist locks which so limited the spreader's capacity [260A, 295A]. These were manually affixed and this gear was kept by the stevedore on the dock [261A, 1696A]. The practice of adapting the spreader by means of wires and hooks began years before the accident [103A, 105A] when four other securing devices called "center twist locks," located on either side of the mid-length of the 40 foot spreader, which had been part of the original spreader design, were removed [148A].

Work at bay 10 began about 10:00 p.m. [145A] with discharging by longshoremen in Mitchell's gang (one of two aboard the vessel that evening) [1802A] of the on-deck cargo. This included, according to the cargo stow plan, [Ex. "22", 3066E] twenty-five 40 foot containers and four 20 foot containers nested end-to-end in pairs in 18 inch high, 40 feet long frames [3067A] called "flatracks." According to respondents and their fact witness, these 20 foot container pairs were locked into the two on-deck flatracks by means of locks. The frames were, in turn, secured to fittings on the "pontoon" hatch covers. According to all the trial testimony, in the event 20 foot containers were properly locked into a flatrack, two *could* be carried by the kind of spreader affixed to the gantry crane at Weekhawken, despite the loss (by removal of the center twist locks) of the spreader's former capacity to securely lock into all 8 corners of two 20 foot containers *from above*. Nonetheless, the on-deck 20 foot containers were unlocked and discharged with the "wires" singly according to all fact witnesses [1716, 2142-4, 148-9A].

When handling a 40 foot container, a signal in the form of the flashing-on of a red light in the operator's cab indicated

that the spreader was secured safely to the load. A similar red light was fitted to the spreader. It too flashed on when the lifting device locked into the load at the spreader's four corners, which in the event of a 40 foot container would be the four corner castings on its upper surface. According to the testimony, if unbeknownst to the crane operator and all the longshoremen working at bay 10, the spreader was lowered atop two 20 foot containers, *as admittedly occurred at the time of the accident*, both spreader locking signals, "reading" only locking at the spreader's four corners, would flash red [109-110A].[6] This is what all the longshoremen witnesses said caused the accident.

According to all eye witnesses as well as those who came to the scene after the accident, the mishap occurred when the spreader was lowered into the deepest recess in No. 4 cell and locked into, not all four corners of a 40 foot container as was thought, but into two corners of each of 20 foot containers. These containers were stowed underdecks in the sixth and lowest level of No. 4 cell, about 40 feet below the level of the main deck where respondents and all other members of their gang still aboard ship were standing. The location of these containers could have been determined from the cargo stow plan which described the place in stow *and size* of every container aboard the vessel. There is no issue of the accuracy of this plan, or that it was sufficient to show to all who were competent to read it that these particular containers were 20, not 40, feet in length and were located in exactly the cell and at the cell level where they were found [see, 1604A].

There is also *no* question that these two 20 foot containers were *not* locked to the flatrack, and that the stow plan contained *no* notation whether they were or were not locked.

---

6 As an additional basis of petitioner Denholm's liability, respondents claimed at trial that one of the corner castings of one of the two 20 foot containers at a corner of the flatrack could have been blocked by what was described as a "shear key," in order to avoid a false positive reading [83-84, 169A].

This plan was given by Seatrain's Marine Operations Manager, Arnold Johnston to Hatch Boss Mitchell, who testified that he was told of the presence of these two 20 foot containers and of their place in stow underdecks during the afternoon [1806A]. Johnston also testified that he had directed the hatch boss' attention specifically to the 20 foot containers, in part because M/S ASIALINER, and perhaps no other in the liner service, had ever before carried 20 footers underdecks [1890A, 1819A]. According to Johnston, Mitchell acknowledged his awareness of the presence of these containers saying "[a]ll right, I'll see what to do with those when I come to them" [1890A]. At trial, Mitchell testified that after he received the stow plan from Johnston he gave a copy of it to the gangwayman, "Mike" Pappagallo [1809A], but also said that he could not remember specifically giving it to him [1829, 1833A]. Aware of the never-before encountered 20 foot containers underdecks, Mitchell nevertheless gave the gang "no special instructions" [1819A].

Respondent, Introna testified that he had never seen the cargo stow plan [777A] and that as far as either respondent knew neither they nor anyone else on deck during the underdeck discharge had ever had anything other than a "piece of paper" showing the container numbers, but not their location or size [777-9-1351A, 840A, 2177A, 2202A]. Not told of the presence of 20 footers underdecks, respondents could not, for reason of lack of illumination down in the cell, see what was being discharged [2155A]; and, thus, did not know (and had no way of knowing) that the spreader was lifting two 20 foot containers from the bottom of cell 4 at the time of the accident.

The cargo stow plan did not contain a notation that the two 20 foot containers involved in the accident contained "label" or "poisonous" cargo. And, according to the statement of the vessel's chief officer, J. Fowler [Ex. "56", 3136A], the ship had "no record" of the fact. The ship's dangerous cargo manifest, and the cargo stow plan as well, were prepared by a separate corporation, Seatrain G.m.b.H., at Bremerhaven, West Ger-

many, where the two containers were loaded by another independent contractor [451, 461A] for whose actions the jury was charged petitioners were not liable [3034-5A]. There was, therefore, no proof that either petitioner knew or should have known that the contents of the two containers were poisonous.

A Federal Regulation in force on April 19, 1976, 46 C.F.R. 146.02-17 (which was "removed" from the Code of Federal Regulations effective July 30, 1976 by order published April 15, 1976) required, in the event of shipment of such cargo aboard a foreign flag vessel, that it be "handled or stowed onboard vessels under the direction and observation" of a ship's officer. No ship's officer was present at bay 10 at the time of the accident nor had one been for one-half hour before the occurrence, a fact which was not in dispute. But no one was injured because the cargo was poisonous. And, had the longshoreman observed the stow plan, assuming that they were ever given it, the lifting of two containers at once would not have been attempted; not for any reason of "supervision" by the ship's officers, but by the practice expected by the longshoreman at Weehawken by hatch boss Mitchell—discharging 20 foot containers individually.

The evidence proved that the purpose of using a flatrack was to secure the two 20 foot containers nested in such device in the stow, since containers of this length could not have been (at their interior ends) otherwise secured (on-deck or underdeck) to whatever they were resting on, as Slapkowski testified [204A]. If on a flatrack underdeck, they need *not* have been locked, according to Robert Hopkins, a maritime expert called by respondents—a warning by stow plan notation or otherwise would have been sufficient regarding safety of handling; and locking of containers to flatracks underdeck was not required for purposes of security in stow [658A, 631A].

Anthony Henderson, the marine operations manager at the port of loading said that the practice at Bremerhaven was never to handle 20 foot containers two at a time locked to a flatrack [463-4A]. Mitchell said that the Weehawken practice was the same: using the "adapters" was "the way we discharge 20 foot

containers at this particular time" [1821-2A]. When asked whether before the accident the on-deck 20 foot containers had been discharged singly he said that they were (although he had not actually been present) *because* "that was the way to take them off" [1827A]. He also testified: "[t]hey weren't taken off with one pick, this I know [Id.] And when asked "how he knew," Mitchell said: "*Because it has never been done*" [Id]. When asked by the court whether when lifting 20 foot containers off the deck he would "have to use this wire bridle" he said "[y]es" [1846A, "adapters," 1847A]. He had seen the Weehawken longshoreman do this by climbing atop the containers "time and time again" [*Id.*], and this could have been done in the hold [1848A]. Mitchell testified that he had never seen even as a "demonstration," the flatrack and two containers as a unit carried aboard ship from the dock [1858A].

Although all the witnesses asked said that discharging two at a time by locking the flatrack "*could*" be done, no one who testified, including Hopkins, ever said that two such containers *should be* so loaded or discharged, or that it was the practice at Weehawken or at any other terminal to do so. Only Captain Munro, the master of M/S ASIALINER on April 19, 1976, testified (by deposition taken by respondents) *without* reference to any terminal's actual practice, that the flatrack was "intended" [1207A] to allow unitized discharge, which perhaps demonstrates only how far a liner service captain is removed from containerized cargo operations [see, 1219, 1222, 548A]. But according to the unsworn statement of the vessel's chief mate, J. Fowler, which was put in evidence by respondents, he saw 20 foot containers on deck at another bay (No. 7) discharged in a flatrack as a unit earlier in the evening, *after* the Weehawken longshoreman locked them (with some difficulty) to their flatracks [Ex. "56" 3135A]. And Fowler's statement concluded that to do so was unsafe.

Respondents' proof of what was occasionally done *negligently* by the stevedore (Fowler's statement) and what "*could*" be done (all witnesses) was of *no* relevance; their proof of whether what could be done was what a competent stevedore

would do was non-existent. Thus, only Slapkowski testified that "the reason. . .[for] these flatrack[s]. . ., is to pick up the whole unit "[136-7A] but when asked not what was their intended, but their "useful purpose." When asked specifically about discharging the containers on-deck at bay 10 prior to the accident, he testified: "[w]e could not lift them because we had no *center twist locks*" [148A], despite the fact that these containers *were* locked [148A]. Slapkowski also said that it was his "immediate reaction" to "stop" upon seeing the "straight line" of demarcation, alerting him to the nature of the load at a time when the containers were only one foot out of a cell surrounded by other containers. Hence, he could not have seen the flatracks, the absence of which could not have been inferred because the containers were not *then* sagging. Surely, the crane operator would not have had the "immediate reaction" he described if it were true that anybody at the terminal placed *any* reliance on the locking of 20 foot containers to flatracks for purposes of cargo handling, as opposed to security in stow. His testimony conclusively shows that he would have "stopped" had he known the mere fact of two containers. But Slapkowski had to rely on actual observation, tragically too late.

This accident occurred because the longshoremen did not get, did not consult or did not appropriately interpret the cargo stow plan. All this was the stevedore's fault. Yet the jury was required to consider the question of petitioners' breach of duty without reference to the stevedore's role.

REASONS FOR GRANTING THE WRIT

A. The Court's Charge Ignored the Federal Law Controlling the Issue of the Vessel's Liability.

Five of respondents' claims of one or both petitioners' liability were allowed to go to the jury unaccompanied by any instruction as to what petitioners' duties were other than as measured by the "reasonable man" test. The court's charge described respondents' claims as follows:

(1) That the presence underdeck of two 20 foot containers not locked to a flatrack "created a dangerous condition" for which respondents might be liable, because of having created the condition or failing to warn the stevedore of its existence [3007-9A];

(2) That if the ship's officers knew or should have known of the presence of "dangerous substances" in the 20 foot containers about to be unloaded, they had an obligation imposed by regulation to be personally present, observing the manner of "handling" of the cargo, which might "have made the difference" [27a];

(3) Since the attempted discharging of the two 20 foot containers by a "single pick" could have been "prevented" by the expedient of blocking an appropriate corner casting of one of the 20 foot containers and, hence making it "physically impossible to make that single pick," defendants could be found negligent for not having adopted this "alternative method in (sic) which this accident could have been prevented" [28a];

(4) That "had there been adequate lighting and that [if] one of the parties could have supplied . . . [it] was shipboard personnel, by either switching on the lights or by rigging portable lights; that [if] the failure to do that contributed to the happening of the accident" the shipowner could be liable [28a-29a];

(5) That "had those center twist locks, which were originally part of the equipment of that spreader, been on the spreader on the date of the accident, the crane operator could have activated them and possibly have locked into the centers . . . [in time to have] prevented the containers from falling" [31a].

Regarding foreseeability the court charged only that "[i]t would not be necessary that a person involved who created the condition or who knew about the condition be able to foresee exactly how an accident would happen if it was foreseeable that a danger was presented, that a reasonable and prudent person "would do something about about it." [3008A]. With respect specifically to the question of liability on account of the "dangerous condition" of two unlocked 20 foot containers underdecks, the court charged that the result of lifting these two containers in that condition "foreseeably could be disastrous" [25a].

Of respondents' five claims of petitioners' liability, three spoke exclusively of conditions existing at the time of the vessel's arrival: (1) the unlocked condition of the containers and the duty to warn of this alleged "unsafe condition;" (3) the "failure" to block a corner casting of one of the two containers and (5) the absence of center twist locks on the spreader. The "inadequate lighting" as a result of "failure" to switch on the lights in the bay and/or to rig portable lights (No. 4), concerned a condition which later developed without petitioners' knowledge in the area controlled by the employer in the course of the discharge operations. The remaining claim (No. 2)—the presence of "dangerous substances" and Denholm's "failure" to supervise discharge in violation of federal regulation—apparently involved a claim of duty parallelling (or superseding) the stevedore's responsiblity for the safety of its longshoremen.

The petitioners' duty with respect to all respondents' claims of fault was misstated, and questions of liability were given to the jury entirely without reference to legal cause or the controlling federal law. Surely, the trial judge must have thought the

case controlled by "ordinary principles of negligence" applicable to a claim of liability of a "third party" entitled to contribution from an employer, where, hence, question of negligence *other* than based on instruction that "[a] reasonable and prudent person will not do something which could foreseeably lead to untoward results" [3006A] is *in*appropriate; and the contribution of a number of more or less proximate causes is but part of the balance assessed by the jury in determining percentages of blame. Just as surely, the distinguished trial judge was wrong.

Despite numerous requests that he do so [19a-23a], the trial judge refused to charge the jury that the shipowner was *to any extent* entitled to rely on the stevedore. The court charged generally that petitioners could be liable for either "creating a dangerous condition or by knowing of a dangerous condition and not giving adequate warning" [3008A] *without* instruction that the duty to warn depended, generally and in every specific instance, not just on petitioners' knowledge, but upon both their knowledge and reason to believe that the "dangerous condition" would not be anticipated and avoided by a non-negligent stevedore. The jury was told that petitioner Seatrain (only) "could rely upon United Terminal as to the way [the actual loading or unloading] was done" but that it had

> "[a]s a matter of law . . . an obligation to notify the stevedoring company . . . [of] the existence of any dangerous condition which . . . [it] . . . knew about or should have known about." [31a].

The jury was advised in similar vein with respect to petitioner Denholm's (yet greater) obligation—that it had "a continuing and independent responsibility with respect to loading and unloading" [24a] which was described by the court as a question of fact [25a] despite the absence of any evidence of actual ship involvement in the handling of cargo at an area of the vessel under stevedore control.

This Court, in *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156 at 166-67 (1981), enunciated the integral

connection between the vessel's duty and the stevedore's competence:

> . . . the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition *that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property,* and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations *and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.* (Emphasis added)

The necessary effect of the trial court's incomplete statement of the law—which completely ignored the vessel's reasonable reliance upon the competence of the stevedore—on the jury's assessment of the specific factual issues in this case is apparent. For example, the court charged that it was "plaintiffs' contention" that "if Mr. Fowler [merely] knew that these containers were unlocked" he had a duty to communicate the fact to the stevedore . . . "[so that] no one would attempt to lift them up with twist locks by the outer corners only" [28a]. Similarly, with respect to Seatrain, the court urged the jury to consider whether Johnston, simply by virtue of his awareness of the containers underdeck, had an obligation "in . . . exercise of reasonable prudence . . . to find out whether these containers were locked or not" [32a].

The court erred by failing to advise the jury that no such duty existed on the part of either Fowler or Johnston unless petitioners had reason to anticipate that the unlocked condition of the containers would create a problem for the steve-

dore. That is, the jury was not told to consider the effect of finding that (a) it was never the practice to discharge 20 foot containers at Weehawken as a unit, or (b) a prudent stevedore would not have assumed either the locked condition of the containers, or acted upon such assumption without confirmation. Because the expected stevedore practice or petitioners' proper reliance on its exercise of reasonable care were not relevant according to the court's charge, the jury was in effect precluded from considering *whether* the vessel had any duty to warn of anything other than the presence of the 20 foot containers underdeck.

Not only was petitioners' duty not circumscribed by what was proven to be the practice of handling 20 foot containers at Weehawken and by their reasonable reliance upon the stevedore's competence, it was defined in terms of what petitioners should have expected an *incompetent* stevedore would do. Perhaps the best example of this was the court's treatment of the issue of inadequate lighting. The court suggested that if the two 20 foot containers had been "perfectly obvious" then "maybe the method of picking them up might have varied" [29a]. This instruction permitted the jury to conclude, notwithstanding the fact that the stevedore had been given a stow plan pointing out the existence and location of the 20 foot continers, that the longshoremen's alleged inability to read the plan or other failure to rely on it might, on the basis of "inadequate lighting," serve as a predicate for liability of petitioners. That is, the jury was permitted to conclude that petitioners should have supplied lights in order that the containers would be "perfectly obvious" even to an adequately warned but nonetheless hopelessly incompetent stevedore.

Under the proper view of petitioners' duty, since there was proof that had the longshoremen known what they were lifting they would have "stopped" and used the "wires," the jury should have been asked to consider that fact in connection with whether there was a dangerous condition, or need to warn of anything other than what the stow plan revealed: the presence of the 20 foot containers underdeck. Similarly, if Johnston,

simply by virtue of his awareness, could be obliged to "find out" whether the containers were locked or not, should not the jury have been told that both petitioners could properly have assumed that the similarly aware stevedore also would have made the same inquiry? Yet, in absence of any proof of active involvement by the vessel the jury was instructed to find against petitioners: for (1) failure to anticipate stevedore negligence, and (2) on account of breach of the (non-existent) duty to discover unsafe conditions ("insufficient light") which developed in the work area after the discharge operation began. Thus, the very factors which the jury, under the applicable law, could have relied upon to exonerate petitioners—the stevedore's duty to exercise reasonable care—became the *basis* of petitioners' liability. In short, the jury was instructed that petitioners had a duty to anticipate and render harmless all conceivable stevedore negligence.

B. The Court's Charge on Liability was Additionally Erroneous With Respect to the Terminal Owner

In the circumstances described at trial, if it were assumed that there had been competent proof of a dangerous condition or failure to warn; and that petitioner, Denholm, the shipowner were properly found liable under this court's holding in *Scindia Steam Navigation Co., Ltd.* v. *De Los Santos, supra*, such liability could only have been imposed on the basis of the "violation" of 46 C.F.R. 146.02-17 requiring supervision by a ship's officer during "handling" of dangerous cargo.[7]

---

7 To justify the result in state court, the regulation would have to be viewed as "positive law" (*Scindia, supra*, 451 U.S. at 172) supplanting the safety obligation of the stevedore with that of the shipowner. There is, however, no reason to think that the regulation should have been given that effect, even if it were properly seen as applicable to discharge. Regulations of this kind, perhaps adding to a shipowner's obligation, in no way lessen the safety responsibility of the stevedore. It is to be seriously questioned whether the regulation was ever intended to apply to discharge as opposed to supervision for purposes of safety of hazardous cargo en route. (See petitioners' brief filed on the appeal before the Appellate Division at pp. 34-36)

There can be absolutely no question that the regulation was inapplicable to the terminal owner. Perhaps for that reason the court charged that Seatrain (unlike Denholm) was entitled to rely on the stevedore with respect to the way the actual work was done. But having said that, the trial judge charged that Seatrain had the obligation to notify the stevedore of any dangerous conditions "which . . . [it] . . . knew about or should have known about" [31a]. With respect, then, to Seatrain's constructive knowledge obligation, the trial court urged the jury to consider whether Johnson, aware of the containers' presence underdeck, "in . . . exercise of reasonable prudence . . . [should have found] . . . out whether these containers were locked or unlocked" [32a]. But the court never charged that the stevedore, possessing the same knowledge as Johnson, had any such obligation; or that Seatrain could rely on Mitchell to "find out."

Under the court's charge, Seatrain, not the stevedore, had the primary responsibility for the safety of the longshoreman. And if Seatrain could be liable in negligence for not "finding out" this could only be because the terminal owner should have anticipated that the stevedore would *not* "find out." Hence, if Johnson were negligent in not determining whether the containers were locked, so was Mitchell; and the terminal owner was liable for not anticipating the stevedore's negligence.

The only way (if at all) that the trial judge's treatment of Seatrain's liability could even arguably be said to be correct is if Seatrain were not a § 905(b) "vessel." In such event, a finding of its liability for General Maritime Law (as opposed to § 905(b)) negligence, if permissible, would be but a predicate of a successful suit against the stevedore for indemnity under *Ryan Stevedoring Company, Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956).

C. The Court's Charge on Damages was Incorrect.

During the direct examination of the economist called by respondents, a juror asked a question "about the effect of income taxes." The court responded: "I will not put the

question to the witness because I am going to instruct the jury, as a matter of law, as to what they are to do with respect to income taxes" [2566A]. What the jury was told to do was "not to take into consideration what taxes might otherwise have been payable on such [lost] wages" [3052A]. This instruction, based upon *Louissaint* v. *Hudson Waterways Corp.*, 111 Misc.2d 122, *aff'd*, 88 A.D.2d 1110 (1st Dept., June 24, 1982), was error since the holding in *Louissant* "should carry no weight any longer in any court." *In Re Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7 Cir. 1983).

There is now no question that under federal law in a FELA case (45 U.S.C. § 51) income taxes must be considered by the jury in finding past and future lost wages, if proved at trial. *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1981). Since the Jones Act (46 U.S.C. § 688) incorporates the FELA, the rule applies in a seaman's case. Seamen, like railroad workers, are without workmen's compensation. The same rule must apply in longshoremen's suits where the plaintiff is entitled to bountiful compensation, since like seamen and railroad workers their rights are based on federal law.

Section 905(b) of Title 33 U.S.C. provides the "exclusive remedy" by which a longshoreman can recover "damages," and the rule of *Norfolk & Western* therefore applies in every § 905(b) case, *Fanetti* v. *Hellenic Line*, 678 F.2d 424 (2d Cir. 1982). A distinguished trial judge ruled (on July 6, 1982) as a matter of law that tax liability could not be proven and should not be heard to say that petitioners failed "to prove any facts which would give the jury an alternative mode of calculation [of what plaintiffs' tax liability was]" [9a]. Both Jones Act and FELA cases can be brought in State Court (45 U.S.C. § 51) and the fact that *Norfolk & Western* was an appeal from a ruling in a FELA case in state court (Illinois) is dispositive.

D. The Proof at Trial Failed to Establish Liability as a Matter of Law

In this case *the* liability issue was said to be whether the stevedore's knowledge, imparted by the stow plan, of the presence of two 20 foot containers in a flatrack underdeck was

enough warning, or whether Denholm (and Seatrain) should have done more—by communicating to the stevedore the fact, known to the vessel's chief officer Fowler, that they were not locked. The vessel's duty in this case was, therefore, a function of: (1) what the cargo operations were supposed to be; and (2) what the vessel could reasonably expect in way of precaution by the stevedore (i.e., "reasonable care" exercised by a "competent expert") during the course of those operations. But the vessel's duty upon turning the vessel, crane and spreader over to the stevedore, as laid down by this Court in *Scindia Steam Navigation Co.* v. *De Los Santos, supra*, (451 U.S. at 167) is not cumulative, it is alternative: the shipowner has no duty to warn of a condition which is not a hazard. And, if a hazard is shown to have existed, a 905(b) plaintiff must also prove that the stevedore *if free of negligence*, would not have anticipated it. A plaintiff cannot prove vessel breach if either the condition was not dangerous or the stevedore was given adequate warning of its existence.

Respondents did not prove that the unlocked condition of the containers was a hazard (of which the vessel had a duty to warn) because the record demonstrates that 20 foot containers at the Weehawken Terminal *were always supposed to be discharged singly.* If so, all respondents' claims of duty breach by the vessel before commencement of work fail at the threshold issue: there was no dangerous condition—the *un*locked condition of the two containers was was appropriate. But if, contrary to the great weight of the trial record, there were a "dangerous condition"—because there was no intended practice of one-at-a-time discharge—there was still no proof of duty breach by the shipowner *unless* such duty included an obligation to anticipate that the stevedore—without being negligent or being assured that they *were* locked—would attempt to lift two such containers with a spreader without center twist locks.

Finally, there was no proximate cause shown between the "dangerous condition," the unproven "breach of duty" and the occurrence of respondents' injuries. Slapkowski and re-

spondents said that they had never seen the plan and did not and could not have known what they were lifting. A "defective" stow plan which is not consulted cannot be a legal cause of injuries. Just as "failure" to lock the containers cannot be a basis for liability if the hatch boss gave "no special instructions" because he assumed correctly that the longshoreman, had they been aware of the 20 foot containers, would have discharged them singly in safety [1821-22A].

CONCLUSION

In this case, consistent with the law of New York State, the jury was instructed to consider whether petitioners "did anything [or failed to do anything] to contribute to the happening of the accident" [7a]. The question whether the stevedore should have prevented the accident by exercise of reasonable care (which under New York law arises in the parallel suit by the defendant for contribution/indemnity from the employer) was totally ignored. As this Court held in *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. at 181 (concurring op., Powell, J.), expansive notions of the shipowner's obligation to longshoremen would routinely result in the imposition of liability and, with that, excusing the stevedore of even its compensation obligation where, as here, the injuries were the result of grossest stevedore negligence. The state courts cannot be permitted to ignore federal law with the catastrophically unjust result such as was achieved in this case.

Respectfully submitted,

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Petitioners

WALKER & CORSA
Of Counsel

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INDEX #8911/76
Cal. No. 46391

JOHN CARCICH, CATHERINE CARCICH, PASQUALE INTRONA, AND VINCENZA INTRONA,

Plaintiffs

—against—

HUDSON WATERWAYS CORPORATION, SEATRAIN LINES INC., J & J DENHOLM MANAGEMENT, LTD., & SCARSDALE SHIPPING CO., LTD.

Defendants

JUDGEMENT AND TRIAL COSTS

The above entitled action having duly come on for trial before the Honorable Justice Edward J. Greenfield, and a jury, at Trial Term Part 22 of the Supreme Court, held in and for the County of New York at the Courthouse located at 60 Centre Street, New York, New York on June 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, and July 1, 2, 6, 7, 8, 9, 12, 13, and 14, 1982, and the plaintiffs having appeared by KENNETH HELLER, attorney for all plaintiffs, and the defendants having appeared by WILLIAM KIMBALL, attorney for all defendants, and the issues having been duly tried, and during the course of the trial, the cause of action on behalf of Catherine Carcich having been withdrawn, and the Court having dismissed, on defendants' motion, all causes of action against defendants, Hudson Waterways Corp. and Scarsdale Shipping Co., Ltd., and

The jury having rendered a verdict in favor of plaintiffs and against defendants SEATRAIN LINES, INC., and J & J DENHOLM MANAGEMENT, LTD. on July 14, 1982, finding said defendants liable on the issue of negligence, and the jury having awarded damages as follows: to plaintiff JOHN CARCICH the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars; to plaintiff PASQUALE INTRONA the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars; to plaintiff VINCENZA INTRONA the sum of One Hundred Thousand ($100,000.00) Dollars, and the jury having apportioned said damage awards as follows: 40% against SEATRAIN LINES, INC., and 60% against defendant J & J DENHOLM MANAGEMENT, LTD.,: and

The court having denied defendants' motion to set aside the entire verdict or for a new trial or to set aside damage awards as excessive, and the Court having granted the plaintiffs' motion to enter judgement in favor of plaintiffs and against defendants SEATRAIN LINES, INC., and J & J DENHOLM MANAGEMENT, LTD. in the amounts hereinabove stated.

NOW, on motion of KENNETH HELLER, attorney for plaintiffs herein, it is adjuded that the causes of action against Hudson Waterways Corp. and Scarsdale Shipping Co. Ltd. were dismissed and it is ADJUDGED that plaintiff JOHN CARCICH have judgement and recover against J & J DENHOLM MANAGEMENT, LTD. and SEATRAIN LINES, INC. on the verdict and the JOHN CARCICH recover of the defendants J & J DENHOLM MANAGEMENT, LTD. and SEATRAIN LINES, INC. the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars, together with the sum of $6,000.00 representing interest thereon from July 14, 1982, together with the sum of $1,860.75, for costs and disbursement as taxed, making the total sum of $1,507,860.75 and that plaintiff JOHN CARCICH have execution therefore.

IT IS ALSO ADJUDGED that plaintiff PASQUALE INTRONA have judgement and recover against defendant SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD., on the verdict and that PASQUALE INTRONA recover of the defendant SEATRAIN LINES INC. and J & J DENHOLM MANAGEMENT,

LTD. the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars, together with the sum of $6,000.00 representing interest thereon from July 14, 1982, together with the sum of $1,860.75 for costs and disbursements as taxed, making the total sum of $1,507,860.75 and that plaintiff PASQUALE INTRONA have execution therefore.

FINALLY IT IS ADJUDGED that plaintiff VINCENZA INTRONA have judgement and recover against defendants SEATRAIN LINE INC. and J & J DENHOLM MANAGEMENT, LTD. on the verdict and that VINCENZA INTRONA recover of the defendant SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD. the sum of One Hundred Thousand ($100,000.00) Dollars, together with the sum of $400.00 representing interest thereon from July 14, 1982, together with the sum of $1,860.75 for costs and disbursement as taxed, making the total sum of $102,260.75 and that plaintiff VINCENZA INTRONA have execution therefore.

Dated: New York, New York
July 30, 1982

NORMAN GOODMAN
Clerk

FILED
JUL 30 1982
COUNTY CLERK'S OFFICE
NEW YORK

as corrected 11/7/83 pursuant to order filed 11/1/83 and bill of costs re-adjusted on 11/7/83

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.: 08911/76, 09196/76, 14915/77,14916/77

JOHN CARCICH, CATHERINE CARCICH, PASQUALE INTRONA, AND VINCENZA INTRONA,

Plaintiffs,

—against—

HUDSON WATERWAYS CORPORATION, SEATRAIN LINES INC., J & J DENHOLM MANAGEMENT, LTD., & SCARSDALE SHIPPING CO., LTD.

Defendants.

Greenfield, J.:

Defendants move, after trial, to stay the entry of any judgments against them, to enter judgment in favor of defendants Hudson and Scarsdale in accordance with the court's ruling during trail dismissing plaintiffs' claims against them on the merits, and for an order setting aside the jury verdicts against the defendants Denholm and Seatrain in favor of John Carcich for $1,500,000, in favor of Pasquale Introna for $1,500,000, and for loss of consortium in favor of Vincenza Introna for $100,000. The grounds are set forth in a non-stop single sentence that rambles on for ten pages.

This case was tried before me and a jury over a one month period from June 17 to July 14, 1982. Plaintiffs John Carcich and Pasquale Introna were longshoremen helping to unload containers from the containership Asialiner when it was docked at Port Seatrain in Weehawken, New Jersey. They were standing on the deck to render manual and visual assistance

when a crane and "spreader" designed to lock and hoist 40 foot long containers was hauling the containers out of the hold and onto waiting tractor trailers. Having lifted several 40 foot containers, the next load, unbeknownst to the crane operator or the unloading gang, turned out in fact to be two adjacent 20 foot containers, not attached or connected to each other in any way. When the containers were lifted clear of the confining guard rails and above the level of the deck, they split apart. One fell down into the hatch. The other, still connected to the unbalanced spreader, suspended by cables from the crane, swung about wildly and struck the plaintiffs, inflicting crushing and compound fractures to both legs of each, with attendant sequellae.

During the course of the trial, the court absolved defendants Hudson Waterways Corp. and Scarsdale Shipping Co., Ltd., the owner and charterer of the vessel, from any responsibility for the happening of the accident as a matter of law. It submitted to the jury for its resolution the question of whether defendant Denholm, the employer of the ship's officers and crew, was negligent in having the two 20 foot containers loaded in the hold, not locked to the underlying flatrack, not knowing whether they could be handled on unloading in the Port of New York, not noting these facts on the stowage plan or the ship's log, not informing anyone in New York of the potential danger, and not having an officer present during the unloading, and whether these acts or omissions were a proximate cause of the accident. The jury was likewise asked to consider whether defendant Seatrain was negligent in not ascertaining whether or not the 20 foot containers in the hold were locked together, in having removed center locks on the spreader which would have enabled it to unload the 20 foot containers in a single pick, in not having sufficient illumination rigged to show the actual situation in the hold, and whether there was a failure to give adequate warning to the crane operator and the stevedoring gang—and whether these were a proximate cause of the accident. The jury, after due deliberation, responded that the negligence of both of these defendants had caused the accident

and resultant injuries, and allocated responsibility 60% to Denholm and 40% to Seatrain.

The jury's verdict on liability was fully warranted by the evidence presented to it. Both sides argued the implications and conclusions to be drawn from that evidence. The jury chose to accept plaintiff's version. On this motion, defendants recite the points raised in virtually every motion and application made during the course of this lengthy trial. Many of them resulted in rulings favorable to the defendants, excluding evidence and alternative theories of liability propounded by plaintiffs. Nevertheless, they are all paraded again, together with rulings for plaintiffs, in a lengthy catalogue of reasons for setting aside the verdict. There would be little point in reviewing each of those rulings, each of which took up innumerable pages of colloquy in the trial record. The court adheres to each of the rulings made during trial, for the reasons therein stated. Likewise, the court declines to change any rulings with respect to requests to charge or exceptions to the charge as given.

The court rejects the unfounded contention that permitting a scaled-down working model of the crane, hold, and containers in the courtroom for visualization and the understanding of the jurors somehow constituted "brain-washing", and tended to make a "circus" of the trial. Order and decorum in the court were preserved at all times. The court likewise emphatically rejects the contention that the court acted as "plaintiffs' judicial advocate" and evidenced "judicial partiality to plaintiffs", the plaint of many losing litigants, and will let the record speak for itself.

Only two of the grounds raised by defendants merit further comment—the alleged physical impossibility of the accident, and the alleged excessiveness of the verdict. Defendants contend that the verdict must be set aside because it was "contrary to indisputable physical facts." It is asserted that because plaintiffs were standing on deck in the "well", with their lower legs below hatch cover level, they could not have been struck to break their legs five to six inches above the ankles. The fact remains that the accident did happen, that it was observed by

the crane operator, that the containers split, and the crane spreader swung about, the plaintiffs were heard to scream, and were then seen lying on deck, "their legs twisted in all shapes." They were removed by stretchers, and an ambulance transported them to the hospital. The ship's log and the stevedoring company's accident report, both made immediately afterwards, corroborated the happening of the accident, the former reporting one of the containers "swung forward and hit the men who were standing on the cross beams", the latter that the crane spreader swung, hitting the men. No other explanation was given for plaintiffs' injuries, yet it was argued they could not have been struck as described. Both sides were permitted to make their arguments to the jury—defendants that it couldn't have happened, and plaintiffs that their recollection of precise location immediately prior to impact may have been off, or that they were struck while falling away from the swinging spreader. The jury rejected defendants' arguments, and found that plaintiffs' injuries were the proximate result of the accident. There was no evidence in the case which would have warranted a finding that either of these men did anything to contribute to the happening of the accident.

As to excessiveness—the jury was asked to consider both general and special damages, which were extensive. They were screaming in pain after the accident, having been struck by a 14 ton container, and the pain continued with considerable intensity for weeks afterwards, as evidenced by the substantial dosage of pain-killers they were given in the hospital. Carcich suffered crush injuries to both legs, with compound fractures. Introna had compound fractures of the tibia and fibula. Both were permanently disabled. Carcich had an open reduction, and fixation of the bones with Steinman pins. There was a permanent bony deformity, scarring and shortening. He complained of continuing numbness and pain, and an inability to walk and stand normally. Introna also had an open reduction and a Steinman pin. After 20 months, there was still no bony union. He had bony irregularity, atrophy and scarring, with difficulty in walking and standing, and the development of

traumatic arthritis. From an occupational standpoint, both men were permanently and totally disabled from pursuing any gainful occupation, in view of their manual labor backgrounds.

In addition to the pain, suffering and disability each of the men sustained, there were also psycic injuries which were claimed. Given the pain, the hospitalization, the inability to sleep and the trauma of the accident, there were sequellae of nightmares, nervousness, phobias, and insomnia, with a high degree of irritability and withdrawal from society. Deprived of active functioning and a feeling of usefulness, each was depressed and moody. Sex life has ceased. Each, having suffered a loss of bodily integrity, and being men whose lives were lived on a physical level, feel their lives have been destroyed and that they would be better off dead. According to the psychiatrists, this is a classic case of post-traumatic stress disorder.

How does a jury put a price on pain, suffering, disability and loss of the zest for life? Because we, as judges, are unable to articulate any formula or guidelines, we must leave the fixation of general damages to the innate good sense of that cross-section of the community which comprises the jury. On special damages, we have some more objective guideposts.

Past hospital and medical expenses were $12,835.43 for Carcich and $5,995.75 for Introna. Both men were union members, their wages rising in accordance with the negotiated union contracts. Lost wages to the time of trial were calculated at $201,210 for Carcich and $191,112 for Introna. It should be noted that, as union members, they had a guaranteed annual wage, which would increase with overtime. On the basis of their respective work expectancies, plaintiffs' expert, who was uncontradicted, calculated on the basis of a *flat* projection that lost future wages for Carcich for his work life expectancy would be another $542,711 and for Introna $374,546. (The latter had a past record of earning less overtime). The total income losses were calculated at $743,921 for Carcich and $565,658 for Introna.

The jury was told what the discounted value of those future lost wages was, and were also given the history of the union

wages increasing 10% per year. Plaintiffs' expert was thoroughly cross-examined, and the court advised the jury that it was in no way bound by plaintiffs' calculations. Counsel for plaintiffs argue that if the projection were to be based on the allocation of overtime to straight time based on 1976 earnings prior to the accident, the totals come out to $1,644,702 for Carcich and $1,393,137 for Introna.

In any event, since the future is not readily calculable, the wage histories and projections were offered for the guidance of the jury. The court charged the jury about discounting to present value, but also charged that inflation of wage rates could be considered, and that these two factors tended to offset each other (resulting in a flat projection). This is in accord with the observations of the Court of Appeals in *Caprara* v. *Chrysler Corp.*, 52 NY 2d 114, 126 (1981), and the Appellate Division, First Department in *Spadaccini* v. *Dolan*, 63 AD 2d 110 (1978). Accord: see *Kaczowski* v. *Bolubusz*, 491 Pa. 561 (1980); *District of Columbia* v. *Barriteau*, 399 A. 2d 563 (D.C. 1979); *Beaulieu* v. *Elliot*, 434 P. 2d 665, 670 (Alaska 1967); and *Doca* v. *Marina Mercante Nicaraguense S.A.*, 634 F 2d 30, 40 (2d Cir. 1980).

The propriety of not taking a deduction for income taxes from future wages has been previously upheld. *Louissant* v. *Hudson Waterways Corp.*, 111 Misc 2d 122, aff'd. 88 AD 2d 1110; lv. to appeal den. ___ AD 2d ___ (10/5/82), ___ NY 2d ___ (11/13/82). In any event, the defendants offered no proof of any facts which would give the jury an alternative mode of calculation. See *Caprara* v. *Chrysler Corp.*, supra, p. 126, cf. *Faretti* v. *Hellenic Line*, 678 F. 2d 424, 432.

Under these circumstances, given the wide scope afforded to the jury to fix both special and general damages to cover the intense pain and traumatic after-effects caused by this terrifying accident, the disability, stress disorders, depression and withdrawal suffered by both men, as well as out-of-pocket expenses and loss of wages, and in view of the sums juries today are finding appropriate to compensate serious injuries, which would have been unthinkable a few years ago, the court is loath to interfere with the considered judgment of the jury.

The amount awarded to Mrs. Introna for loss of consortium (there has been a complete cut-off of her sex-life and social life, and her once lively and helpful husband has become disagreeable and uncommunicative, vegetating in the house) cannot in any way be deemed unreasonable.

Motion of defendants Seatrain and Denholm to stay entry of the judgment, to set aside the jury verdict, to dismiss all causes of action, or alternatively for a new trial, is denied in all respects. Motion of defendants Hudson and Scarsdale to dismiss the complaint against them is granted.

Enter judgment.

Dated: Feb. 14, 1983

EDWARD J. GREENFIELD
J.S.C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of Ne v York, on 28th day of June, 1983

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
John Carro
Sidney H. Asch
Arnold L. Fein, Justices

17237

JOHN CARCICH, CATHERINE CARCICH, PASQUALE INTRONA AND VINCENZA INTRONA,

Plaintiffs-Respondents,

—against—

SEATRAIN LINES INC. AND J. & J. DENHOLM MANAGEMENT, LTD.,

Defendants-Appellants.

Order of Affirmance on Appeal from Judgment

An appeal having been taken to this Court by the above-named defendants-appellants from the judgment of the Supreme Court, New York County (Edward J. Greenfield, J.), entered on July 30, 1982, which, *inter alia*, awarded plaintiffs John Carcich and Pasquale Introna $1.5 million each, and said appeal having been argued by Mr. Joseph T. Stearns of counsel for the appellants, and by Mr. Fred R. Profeta, Jr. of counsel for the respondents; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondents recover of the appellants $75 costs and disbursements of this appeal.

ENTER:

JOSEPH I. LUCCHI
Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 22, 1983.

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
John Carro
Sidney H. Asch
Arnold L. Fein, Justices.

17237

JOHN CARCICH, CATHERINE CARCICH, PASQUALE INTRONA AND VINCENZA INTRONA,

Plaintiffs-Respondents,

—against—

SEATRAIN LINES INC. AND J. & J. DENHOLM MANAGEMENT, LTD.,

Defendants-Appellants.

The above-named defendants-appellants having moved for reargument of or leave to appeal to the Court of Appeals from this Court's order entered on June 28, 1983; and for a stay of execution and enforcement of the judgment appealed from and affirmed by this Court pending hearing and determination of movers' motion for leave to appeal to the Court of Appeals or reargument,

Now, upon reading and filing the notices of motions, with proof of due service thereof, and the papers filed in support of said motions, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon.

It is ordered that appellants' motion (M-3472) seeking reargument or leave to appeal to the Court of Appeals is denied; and appellants' motion (M-3495) for a stay, is dismissed as moot, with $20 costs.

ENTER:

JOSEPH LUCCHI
Clerk.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of December A.D. 1983

PRESENT,

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 1058

JOHN CARCICH, *et al.*,

Respondents,

vs.

HUDSON WATERWAYS CORPORATION & ano.,

Defendants,

and SEATRAIN LINES, INC., & ano.,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

APPENDIX F

Statement Pursuant To Supreme Court Rule 28.1

1) *Subsidiaries of Seatrain Lines, Inc.*

Liberty Shipping Co., Inc.
Governors Shipping Co., Inc.
Ocean Equipment Corp.
Seatrain Lines of Puerto Rico, Inc.
Seatrain Terminals of California, Inc.
Langfitt Shipping Corporation
McRae Shipping Corporation
Seatrain Shipbuilding Corp.
Seatrain Realty Corp.
Narrows Shipping Corporation
Hase Shipping Corporation
Transeastern Associates, Inc.
Haan Shipping Corporation
Manhattan Grain Terminals Corporation
Seatrain Agencies, Inc.
Seatrain Gitmo, Inc.
Tyler Tanker Corporation
Seatrain Congulf, S.A.
Seatrain Trading S.A.
Seatrain International, S.A.
Seatrain Mideast, S.A.
Port Services Management Ltd.
Buchanan Equipment Leasing Co., Inc.
Polk Tanker Corporation
Fillmore Tanker Corporation
Pierce Tanker Corporation
Albatross Tanker Corporation
Gulf Container Transport Corp., S.A.
Seatrain Europa B.
Dakar Container Corp.
Kenya Container Corp.

Globe Container Corp.
World Container Corporation
Gold Coast Transport Corp.
Garfield Tanker Corporation
Harrison Tanker Corporation
Seatrain Sales, Inc.
Bedford Assurance Co., Ltd.
Corporate Information Systems, Inc.
Seatrain Intermodal Services Corp.
North River Shipping Corp.
Seatrain Lines Inter-Carribean S.A.
Transworld Container Corp.
Seatrain Trading Inc./STL Trading, Inc.
Clermont Shipping Co., Inc.
T.P.Z. Associates, Inc.
Calvert Shipping Co., Inc.
Clinton Shipping Co., Inc.
Jackson Tanker Corporation
Bedloes Shipping Co.
Scarsdale Shipping Co., Ltd.
Cumberland Shipping Co., Inc.
Manhattan Barge I, Inc.
Bedford Shipping Co., Inc.
Italian Line World Cruises, Inc.
Seatrain Energy & Resources, Inc.
Barbour Oil Co.
J.L. Mullens Coal Co., Inc.
Fox Run Energy, Inc.
Rabbit Run Energy, Inc.
Seatrain Coal Management Corp.
Commodity Chartering Corporation
Manhattan Tankers Co., Inc.
Transeastern Shipping Corporation
Hudson Waterways Corporation
Seatrain International N.V.
Seatrain Congulf, N.V.
Compania Naviera Romano, S.A.
Compania Naviera Minoan, S.A.

Compania Naviera Lucretia, S.A.
Compania Naviera Capistrano, S.A.
Compania Naviera Asiatic, S.A.
Compania Naviera Pacific, S.A.
Compania Naviera Lago Mar, S.A.
Compania Naviera Alvino, S.A.
Compania Naviera Marlena, S.A.
Good Hope Transport Corp.
Compania Naviera Combinado, S.A.
Petro Lines, S.A.
Dara Shipping Co., Ltd.
Societe Mediterrannee, S.A.
Compania Naviera Caminoreal, S.A.
Compania Naviera Rebecca, S.A.
Compania Naviera Maria, S.A.
Compania Naviera Cornucopia, S.A.
Ocean Container Equipment, S.A.
Seatrain Belgium
Seatrain G.m.b.H.
Seatrain A.G.
Seatrain Benelux, N.V.
Nordiska Havstag A.B.
(Seatrain A.B.)
Seatrain France, S.A.R.L.
Plymouth Tankers, Inc.
Compania Naviera Evans, S.A.
Compania Naviera Regina, S.A.
Seatrain U.K. Ltd.

2) Upon information and belief, the following are affiliated companies of J & J Denholm Management, Ltd.: Denholm's Ships Management, (Overseas) Ltd. (Hong Kong); Glen-Eagle Ships Management, Denholm (Bermuda) Ltd., Denholm Ship Management.

APPENDIX G

Defendant's Requests to Charge

16. Scarsdale's/Denholm's duty to exercise reasonable care under the circumstances did not impose upon it/them a continuing duty to inspect the operation of discharging the containers after United Terminals, Inc. began to do so. Scindia Steam Navigation Co., Ltd. v. De Los Santos, ____ U.S. ____, 101 S. Ct. 1614, 68 L. Ed. 2d 1.

17. Scarsdale/Denholm had no obligation to warn United Terminals, Inc. or any of its employees of any hazards on the ASIALINER or with respect to the ship's equipment which were or should have been obvious to or anticipated by United Terminals, Inc. or its employees. Scindia, supra.

18. Scarsdale/Denholm had no duty to inspect or supervise the discharge operation performed by United Terminals, Inc. Scindia, supra.

19. Scarsdale/Denholm did not have a non-delegable duty to protect either Mr. Carcich or Mr. Introna from injury. Scindia, supra.

20. Scarsdale/Denholm did not have a continuing duty to discover or correct dangerous conditions which may have developed during the course of discharging the containers. Scindia, supra.

21. Scarsdale/Denholm cannot be found liable for any acts or omissions of United Terminals, Inc. or any of its employees. Scindia, supra.

22. Scarsdale/Denholm cannot be found liable for the manner by which or methods by which United Terminals, Inc. or any of its employees discharged the containers. Scindia, supra.

23. Scarsdale/Denholm cannot be found liable because of any defects in the gear or equipment used by United Terminals, Inc. or any of its employees to discharge the containers. Scindia, supra.

24. Scarsdale/Denholm could properly rely on United Terminals, Inc. and its employees to avoid exposing Mr. Carcich and Mr. Introna to any unreasonable dangers. Scindia, supra.

25. United Terminals, Inc. was obligated to provide a reasonably safe place to work and take such safeguards with respect to equipment and working conditions as may have been necessary to avoid injury to Mr. Carcich and Mr. Introna. Scindia, supra.

26. United Terminals, Inc. warranted that it would discharge the containers in a workmanlike manner. Scindia, supra.

27. Scarsdale/Denholm had a legal right to expect that United Terminals, Inc. and its employees would discharge the containers properly and without any supervision by any mate or other crewmember of the ship. Scindia, supra.

28. United Terminals, Inc. was in the best position to avoid accidental injury to its own employees during the discharge of the containers and Scarsdale/Denholm could properly rely on United Terminal's warranty to perform competently. Scindia, supra.

29. Scarsdale/Denholm had no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions which may have developed during the cargo operations which were assigned to United Terminals, Inc. Scindia, supra.

30. Scarsdale/Denholm is not liable for injuries to employees of United Terminals, Inc., such as Mr. Carcich and Mr. Introna, if caused by dangers unknown to Scarsdale/Denholm and about which it had no duty to inform itself. Scindia, supra.

31. Scarsdale/Denholm had no duty to inspect or supervise the operation of discharging the containers. Scindia, supra.

32. Scarsdale/Denholm had no duty to anticipate that United Terminals, Inc. or any of its employees would not or

could not correct any danger which may have arisen during the discharge of the containers if any failure to do so by United Terminals, Inc. or any of its employees was obviously improvident. Scindia, supra.

33. If the effective cause of injury to Mr. Carcich and Mr. Introna was a simple act of operational negligence by any employee or employees of United Terminals, Inc., then Scarsdale/Denholm would not be liable for the injuries. Scindia, supra.

* * * * *

36. In determining whether or not Scarsdale/Denholm was negligent, you may consider whether Scarsdale/Denholm could reasonably expect that United Terminals, Inc. and its employees would be able to avoid the danger which plaintiffs claim caused the accident, would be able to avoid that danger in the course of performing United Terminal's obligations to Scarsdale/Denholm to discharge the containers in a competent and workmanlike manner. Giglio v. Farrell Lines, 2 Cir., 613 F. 2d 429.

37. Scarsdale/Denholm could appropriately rely on United Terminals, Inc. and its employees to fulfill the primary obligation of United Terminals, Inc. to correct known or obvious defects which, if left uncorrected, might endanger the safety of the longshoremen employees of United Terminals, Inc. Evans v. Transportacion Maritime Mexicana, 2 Cir., 639 F. 2d 848.

38. United Terminals, Inc. was primarily responsible for the safety of Mr. Carcich and Mr. Introna. Evans, supra.

39. United Terminals, Inc., an independent contractor in control of the operation of discharging the containers, was in the best position to prevent accidents which might arise in the course of unloading the containers. Evans, supra.

40. Scarsdale/Denholm cannot be held liable if it had no notice of the claimed danger which is claimed to have caused the injury to Mr. Carcich and Mr. Introna. Evans, supra.

41. Even if Scarsdale/Denholm actually knew of the claimed danger which is claimed to have caused the injury to Mr. Carcich and Mr. Introna, Scarsdale/Denholm would not be liable if it could reasonably anticipate that United Terminals, Inc. and its employees would be able to avoid the danger. Evans, supra.

42. United Terminals, Inc. was specifically hired to unload the containers because of its expertise in coping with dangers inherent in the discharge operation. Evans, supra.

43. Ordinarily, Scarsdale/Denholm should be entitled to rely on United Terminals, Inc. to perform the job of discharging the containers in a safe and workmanlike manner. Evans, supra.

44. Scarsdale/Denholm had no continuing, non-delegable duty to furnish either Mr. Carcich or Mr. Introna with a safe place to work. Evans, supra.

45. Scarsdale/Denholm is not liable for the equipment or work methods of United Terminals, Inc. or its employees or for any negligent acts or omissions by United Terminals, Inc. or any of its employees which occurred during the course of discharging the containers. Evans, supra.

46. United Terminals, Inc. was hired to discharge the containers because of its expertise in a specialized and often dangerous trade and United Terminals, Inc. was primarily responsible for the safety of Mr. Carcich and Mr. Introna while the containers were being discharged. Evans, supra.

47. Scarsdale/Denholm had no duty to take special precautions to insure the safety of Mr. Carcich or Mr. Introna. Evans, supra.

48. In determining whether Scarsdale/Denholm should have anticipated the harm which allegedly caused injury to Mr. Carcich and Mr. Introna or whether Scarsdale/Denholm acted reasonably to prevent or minimize the extent of the risk, you may consider the fact that as a matter of custom and practice

in the Port of New York, a shipowner or ship operator relies on the judgment of stevedoring companies such as United Terminals, Inc. with respect to the safety of the work area since the stevedoring company is primarily responsible for the safety of its longshoremen employees and is obligated by Federal statutes and regulations to correct any unsafe condition aboard the ship of which the stevedoring company knows or, as an expert, should know. Evans, supra.

49. Scarsdale/Denholm had no duty to take reasonable steps to eliminate or correct any dangerous condition known to Scarsdale/Denholm which is claimed to have been a proximate cause of the injury to Mr. Carcich and Mr. Introna unless plaintiffs prove that Scarsdale/Denholm should have anticipated that, despite the obviousness of the condition, United Terminals, Inc. and its employees would not or could not correct the condition and that the longshoremen employees of United Terminals, Inc. would not or could not avoid the obvious danger. Lieggi v. Maritime Company of the Philippines, 2 Cir. 667 F. 2d 324.

* * * * *

79. Seatrain Lines, Inc. cannot be found liable for any acts or omissions of United Terminals, Inc. or any of its employees.

80. Seatrain Lines, Inc. cannot be found liable for the manner in which or methods by which United Terminals, Inc. or any of its employees discharged the containers.

* * * * *

83. If United Terminals, Inc. could have safely discharged the containers in question by the exercise of reasonable care, then Seatrain Lines, Inc. is not liable if the accident in question was caused by the failure of United Terminals, Inc. or any of its employees to use such care. Ruffino v. Scindia Steam Navigation Co., 2 Cir., 559 F. 2d 861; Hickman v. Jugoslavenska Linijska, 2 Cir., 570 F. 2d 449.

* * * * *

APPENDIX H

The evidence in this case, which does not appear to be contradicted, is that there were four 20 foot containers stowed below deck and more 20 foot containers above deck. Each of those pairs of 20 footers was placed atop a flatrack in the platform or bays on which they rested.

The testimony, largely from Mr. Fowler, the chief officer, whose testimony we heard but whom you did not see, was that these 20 foot containers were loaded in Bremerhaven, Germany. That he was there and observed the loading and that the 20 foot containers on deck were locked to flatracks; and that 20 foot containers below deck were loaded separately; first, the flatrack went down, and then one container and then another container.

So, it is the plaintiffs' contention that loading 20 foot containers below deck atop a flatrack without their being locked created a dangerous situation.

The actual cargo plan was drawn up by Seatrain GMBH, a German Corporation, and their acts and their responsibilities are not before us for judgment.

The actual loading of the containers was performed by the German stevedoring company, and their acts and their responsibilities are not before us.

The question is, what is the responsibility of Denholm and what is the responsibility of Seatrain?

Now, Denholm is the name of the company that manned and operated the ship. Denholm supplied the master, supplied the ship's officer, supplied the crew. They were the operating entity of that ship, and under our law any negligent act, any omission by ships master, by ship's officers or by the crew is the responsibility of their corporate employer, Denholm.

So, plaintiffs contend that the ship's officer, the master or such officer as is designated by the master, the cargo officer or whoever, has a continuing and independent responsibility with respect to loading and unloading and nothing can go aboard the ship and be stowed any place on the ship unless that place

and that method of stowage meet the approval of the ship's master or cargo officer.

Therefore, plaintiffs contend when these 20 foot containers were loaded aboard atop a flatrack not locked, that constituted the creation of a dangerous condition in which the personnel of Denholm took part.

Further, contends the plaintiff, knowing that these containers were not locked, knowing that this was the first time that such containers were being carried below, knowing the inaccessibility of those containers in the hold, Mr. Fowler, as the chief officer, made no notation in the log, made no notation on the cargo stowage plan and did not communicate orally either to the master, to other officers or to the shore side personnel at Port Seatrain.

The plaintiff says: If Mr. Fowler knew that these containers were aboard atop this flatrack, unlocked, he was the only one, he had a duty to make that dangerous condition known because if there was an attempt to lift these two containers in a single pick the results foreseeably could be disastrous.

So, I will ask you first to focus on the question of the responsibility of Denholm, ie., the ship personnel. Was there a continuing obligation on the part of the ship's officers of Denholm to supervise the loading and the handling of cargo? Is that something that they had a responsibility for or was their responsibility discharged once they said to the stevedore, "You undertake to load and unload and we have nothing further to do with it"

Plaintiff, in connection with the contention that there was a continuing duty to supervise loading and unloading, relied on two things:

One is the testimony of Captain Robert Hopkins, a licensed master mariner in the British Maritime Service, who has testified that the master and the officers have the ultimate responsibility for the stowage plan; that they have a responsibility for being on deck when cargo is handled; that they have a responsibility for knowing the capabilities of gear in the unloading port; and that the master has a responsibility to

those who come aboard the vessel to do the work of unloading that vessel.

Further, the plaintiff has argued that by statute there is a requirement that a ship's officer be present during loading and unloading.

What is the section, Mr. Heller?

MR. HELLER: 146.02-17.

THE COURT: Now, you have heard a great deal in this case about "hazardous cargo." You may have been wondering what that was all about, because the men who were injured weren't poisoned, there was no powder that blew up, there was nothing that caught fire. So, what has all this business about hazardous cargo got to do with anything in this case?

The reason that it was mentioned is that when hazardous cargo is being handled there are certain obligations which are imposed upon the ship's personnel. And the Coast Guard code of Federal Regulations dealing with the Coast Guard has a specific statutory provision as to what those responsibilities are. That's why there has been all this talk about hazardous cargo or whether people knew it was hazardous cargo.

Section 146.02-17 is the provision dealing with handling and stowage of cargo, and it provides:

"Explosives or other dangerous articles or substances as cargo shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty."

The latter sentence of that section reads:

"For foreign vessels—" and the Asia Liner was a foreign vessel—"such person shall be an officer of the vessel assigned to such duty by the master of the vessel."

Plaintiffs argue that since the contents of these 20 foot containers contained poison, substances which should be labeled as dangerous or hazardous cargo, and that the ship's officers and crew knew or should have known that these containers contained hazardous cargo, that they were required not only as a matter of good maritime practice, as Capt. Hopkins testified to, but were required by the law to have an

officer present personally supervising the loading or the handling of that cargo.

Plaintiffs contend that the nature of the substance, the fact that it was hazardous cargo was known to the officers or should have been known because there were labels affixed to at least one of the containers and that there was or should have been a hazardous cargo manifest which is required to list all hazardous cargo. And that if ship's officers knew or should have known that those particular containers which contained dangerous substances, were about to be unloaded, then they had an obligation to be personally present observing the manner of handling of that cargo.

Now, what difference does that make in this case?

It is plaintiffs' contention that if they knew this was dangerous cargo, as they should have, that if somebody was present and personally supervising at the time that these particular containers were being handled, that that officer, whether it was Mr. Fowler, the cargo officer, or someone else designated to be in charge, was a person who knew or should have known that those 20 foot containers in the hold were not locked to the flatrack, and that if he had been on hand as required he could have told the stevedore personnel there was no way they could take this up with one pick if he saw a 40 foot spreader going down without being equipped to pick up 20 foot containers separately.

That's one of the theories, you see, of plaintiff's case and that is why the Court permitted this inquiry into whether this was hazardous cargo and whether it was known by ship's personnel to be hazardous cargo, and this is a question, ultimately, for your determination; whether the presence of a ship's officer at the time these containers were being handled would have made a difference.

That is one of the theories upon which the plaintiffs claim there was negligence in this case.

I have quite a ways to go. Do you want to take a short recess?

All right, we will take a short recess.

No discussion, please.

(Whereupon, a short recess was taken, after which the trial continued.)

THE COURT: We were dealing with the plaintiffs' contentions as to the duty of Denholm and its personnel with respect to supervising, loading and handling of cargo. And we also mentioned the contention by the plaintiff that if Mr. Fowler knew that these containers were unlocked, that he had a duty to see that that was communicated either in writing or orally so that it would be passed on to those dealing with the unloading of those containers and that no one would attempt to lift them up with twist locks by the outer corners only.

In that connection, the plaintiffs have also argued, on the basis of testimony in the record, that in addition to making a notation or communication about the unlocked condition of the containers, that a single pick could have been prevented by the expedient of blocking the corner castings by putting in locks such as the kind which is in evidence so that when the spreader went down to make the pick and it would attempt to insert the twist locks into the corners, if those corners were already blocked, it would be physically impossible to make that single pick and something else would have to be done.

So that, argues the plaintiffs, is an alternative method in which this accident could have been prevented by the simple expedient of blocking those corners so that there could not be a lift, and that somebody would have to go down physically and take those locks out and then use the wire cables and fit them around.

Further, in connection with the responsibilities of the ship, it is the plaintiffs' contention that there was a lack of or inadequate illumination, and that this created a condition which contributed to the happening of the accident.

It is the plaintiffs' argument that had there been adequate lighting, and that one of the parties who could have supplied the adequate lighting was shipboard personnel, by either switching on the lights or by rigging portable lights; that the failure to do that contributed to the happening of the accident.

The plaintiffs testified that when they looked down into the hold it was as dark as a cemetery.

The crane operator testified that when he looked down he could see two or three containers deep.

Mr. Fowler, in the statement he made after the events, indicated that the illumination was poor because of the other containers in the hold.

We don't know, of course, whether those lights were switched on after the accident or if they were on all the way through. You have to make a factual determination with respect to the lighting. Was it totally black? Was there some illumination which did not reveal any reason for inquiry?

If it were perfectly visible, and if it were perfectly obvious that there were two separate 20 foot containers down at the bottom of the hold, maybe the method of picking them up might have varied.

But in the absence of illumination, plaintiffs contend, there was no way in which anyone could tell that that was a dangerous situation. The spreader went down, locked in, the red light went on and they signalled to lift away.

So, those essentially are the bases upon which the plaintiffs claim you can find there was negligence on the part of Denholm, having those containers stowed below deck, unlocked; not making notations; not communicating that fact; not having appropriate illumination; and not having blocked the corners; all acts or omissions which might constitute negligence.

Now, it is the defendants' contention that the ship stowage plan was adequately marked to show that these were separate containers.

That there is no proof that the ship's officers knew that this was hazardous cargo requiring their presence.

That it was not necessary for an officer to be physically present.

That there was an officer aboard who was attending to the ballast at the time.

That the providing of illumination is not one of the responsibilities of shipboard personnel.

And that whether an officer was present or not present at the time would not have made any difference with respect to the happening of this accident.

You have a sharp conflict. And you have to make a determination as to whether on the basis of everything you have heard and seen, and exhibits, there is a basis upon which you can say that the personnel of Denholm were negligent in the loading, unloading, failing to supervise and failing to notify of this potentially dangerous condition.

With respect to Seatrain. Seatrain was the operator of the terminal. Mr. Johnston was the man from Seatrain who was responsible for seeing, ultimately, that the ship got unloaded. He worked through a stevedoring company, United Terminals. They were the agency designated to do the actual work, and Mr. Arthur Mitchell was the gang boss who would be in charge of that operation for United Terminals.

In order for the plaintiffs to recover against the defendant Seatrain the plaintiffs would have the burden of proving by a fair preponderance of the credible evidence that a dangerous condition existed aboard the Asia Liner and that Seatrain either knew or should have know about the danger; and that stevedores handling that cargo might be injured by that danger; and that Seatrain was negligent with respect thereto and that negligence contributed to the injury of Mr. Carcich and Mr. Introna.

Now, we know that United Terminals provided the personnel that did the loading and unloading work.

We know that the equipment at Port Seatrain, Weehauken, New Jersey, was provided by Seatrain itself.

The gantry crane was owned by Seatrain. Operated by a United Terminals crane operator.

The spreader has been ordered by Seatrain from the company at which Mr. Roger Wolfe was employed.

MR. HELLER: Marathon.

THE COURT: It does not make any difference what the name is.

Seatrain had ordered that equipment for use in the loading and unloading process of containers.

Seatrain would receive the cargo stowage plan in advance of the actual operation of loading or unloading, and Seatrain would notify the stevedores as to where to proceed.

It is clear that Seatrain had no obligation with respect to the actual manner of performance of the work, they hired United Terminals to do it and they could rely upon United Terminals as to the way in which that was done.

As a matter of law, however, I will advise you that Seatrain would have an obligation to notify the stevedoring company and personnel as to the existence of any dangerous condition which they knew about or should have known about.

Now, the plaintiffs contend with respect to the liability of Seatrain that that existed on several bases.

First of all, plaintiffs say this spreader as ordered originally had a capacity for lifting a pair of 20 foot containers in one pick because it had center twist locks. And indeed, argues the plaintiff, had those center twist locks, which were originally part of the equipment of that spreader, been on the spreader on the date of the accident, the crane operator could have activated them and possibly have locked into the centers as soon as he saw that these were separate containers and have prevented the containers from falling. And that it was Seatrain personnel who modified the equipment and removed those center twist locks, the reason being that they tended to cause some kind of damage to the center of the 40 foot containers.

Plaintiffs contend that Seatrain also was responsible for providing illumination. Their illumination would be from shoreside facilities from, for example, the arms of the gantry crane or the cab of the crane.

Plaintiffs contend that that lighting was either absent or not existant on the night of the accident except for one light under the cab of the crane.

Plaintiffs contend that that lighting was either absent or not existant on the night of the accident except for one light under the cab of the crane.

There is no duty on the part of Seatrain personnel to have somebody stationed and present, unlike the condition that may exist for shipboard personnel, during the course of the unloading operation.

What plaintiffs do claim is that Seatrain, through its personnel, was negligent in failing to give appropriate warning to the stevedoring personnel.

There was some difference in the testimony as to whether the stevedors [i.e. the longshoremen] did or did not get the cargo stowage plan showing the existence of the 20 foot containers in the hold.

I don't recall if there was any testimony that indicates that that cargo stowage plan indicated whether those containers were locked or not locked to the flatrack.

This was the first time those separate 20 foot containers were carried on a flatrack in the hold.

There is a statement from Mr. Fowler to the effect that he knew that the cargo stowage plan was available to the Seatrain personnel and that he mentioned the existence of the 20 foot containers.

He also, in his statement, said something about that in his opinion that he also communicated to Mr. Johnston about the adequacy of unloading those through the use of the spreader with twist locks, and that he thought some other method would be more appropriate.

Mr. Johnston, who testified, says that he know that the two 20 foot containers were down in the holds; that he communicated that fact to Mr. Mitchell, the boss of the stevedores.

The question is whether he knew or should have known that these containers were unlocked, and if Mr. Fowler had failed to say something about their locked or unlocked condition, did he, Mr. Johnston, in the exercise of reasonable prudence in dealing with this first time situation, did he have an obligation, as a reasonably prudent person, to make inquiry and find out from Mr. Fowler whether these containers were locked or unlocked?

It is the plaintiffs' contention that if he failed to do so, that he should have known, that he should have inquired and that he didn't know and didn't find out, and if he didn't communicate that to the stevedors, that that was an act of negligence on the part of Seatrain.

So, with respect to the equipment, the illumination, and the failure to make inquiry and the failure to warn, plaintiffs contend, there is a basis for your finding that defendant Seatrain was negligent.

As I have indicated defendant contends that Seatrain had no duty of continuing supervision.

That it passed on the cargo stowage plan to Mr. Mitchell.

That Mr. Mitchell said he would take care of it.

And that, therefore, Seatrain discharged its obligation as a reasonable and prudent person.

Those are the issues which are posed to you.

How, in connection with these respective contentions that there was a breach of duty which constituted negligence or that there was not, if you find that defendant Denholm or defendant Seatrain, or both, breached their duty of reasonable care, if they did not do that which was reasonable and prudent, was that failure on the part of either or both of these defendants a proximate cause of the happening of this accident?

You see, somebody can be derelict in a number of respects and if it does not lead directly to the happening of an accident it is not a proximate cause, it is of no consequence.

* * * * *

So, in this case, if you find that there was a breach of duty, if you find that negligence existed, you have to find that that breach of duty, that act or that failure to act, gave rise to a chain of events which flowed inexorably to the happening of the accident.

Now, when we say "proximate cause of the accident," that does not mean that any particular act of negligence has to be the sole and exclusive cause. It is enough if an act of negligence is a proximate cause, one of the contributing causes to the happening of the accident. If that causal connection exists, breach of duty, a failure to act or an improper action which caused the happening of the accident, then there is a basis for liability.

* * * * *

Now, it has been a major position of the defendant in this case that if there was a failure on the part of United Terminals, the stevedore, or Seatrain GMBH, the German corporation, which is not a party in this lawsuit, or the German stevedoring company which loaded these 20 foot containers separately onto the flatrack without locking them.

Now, if you find, on the basis of your analysis of the testimony, that all the fault in this case was that of parties who are not defendants in this case, if you find that all the fault was that of Seatrain GMBH or the German stevedore or of United Terminals, and nobody else's fault, then no matter what injury these plaintiffs may have sustained they may not recover from these defendants. You must find these defendants at fault in order for there to be a recovery in this case.

Now, what happens if you find, on the basis of your analysis, that Denholm was negligent and/or Seatrain was negligent and United Terminals was negligent and that one or more other entities were negligent? Then, ladies and gentlemen, we have a situation in which there is concurrent negligence by a group of persons whom we call joint tort feasors, that is, persons, each of whom may have committed one or more acts of negligence. If you find that, that there is negligence on the part of Seatrain and/or Denholm and other agencies as well, that should not affect your verdict.

The two defendants who are being sued here are being sued for their negligence, and if you find that there are other parties who are negligent as well, other persons who are joint tort feasors, that does not excuse the negligence of the defendants being sued here, and your obligation is to return such verdict as you find appropriate against those parties who are defendants here.

The question is did these defendants commit acts of negligence which caused the injuries? And if they did, there is no diminution of their responsibility because other persons or companies also may have been negligent. But you must find there were acts of negligence on the part of these defendants before you can hold them responsible.

If Denholm committed acts of negligence, then it is responsible, even if United Terminals was also negligent.

If Seatrain committed the acts of negligence, then it is responsible even though the German stevedore may have committed acts of negligence.

It is the contention of the defendants in this case that Denholm and Seatrain did all that they could or should have

done, that they did act reasonably and prudently, and that such negligence as may have existed was the negligence of United Terminals in that Mr. Arthur Mitchell was told of the existence of two 20 foot containers below deck, and he said he would take care of it, and it was his responsibility to provide for the safe unloading of those containers.

If you find that the negligence here was wholly and entirely the negligence of United Terminals in failing to do what it should have done through its supervisors and employees, and there was no negligence on the part of defendants Denholm or Seatrain, then you must return a verdict in favor of the defendants.

If you find that there was negligence on the part of one or both of them, which was a contributing proximate cause to the happening of this accident, then you must find against such defendant without regard to any negligence by parties who are not before us.

If you find that there has been negligence which proximately caused the injuries of these plaintiffs by Denholm alone, or by Seatrain alone, then that will be your verdict.

If you find that their injuries have been caused by the negligence of both of them, I will ask you to make an apportionment of responsibility.

In other words, if you find both Denholm and Seatrain to be liable, I will ask you to determine in what proportions, 50-50, 60-40, 10-90, whatever you deem to be the respective responsibilities of these defendants. That will be part of your job in determining the verdict and I will ask you specifically to answer that question.

* * * * *

83 - 1448

No.

In The

Supreme Court of the United States

October Term, 1983

SEATRAIN LINES, INC., and J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

vs.

JOHN CARCICH, PASQUALE INTRONA and VINCENZA INTRONA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KENNETH HELLER
Attorney for Respondents
305 Broadway
New York, New York 10007
(212) 349-0338

FRED R. PROFETA, JR.
Of Counsel

0238

Ivis Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

Contents

No.

In The

Supreme Court of the United States

October Term, 1983

SEATRAIN LINES, INC., and J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

vs.

JOHN CARCICH, PASQUALE INTRONA and VINCENZA INTRONA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners' brief belies itself. It purports to describe a jurisdictional basis in this Court, but the reader is led, however imperfectly, on a tedious odyssey through a myriad of factual

disputes — all resolved by the jury below and reviewed by the New York Appellate Division and Court of Appeals. Foundering under the weight of the facts, petitioners desperately contend for some imagined disparity between the legal principles applied below and those which obtain under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

But there is nothing to any of this. All of petitioners' issues contain heavy factual components, and that alone is fatal at this level. The only really serious argument raised by petitioners relates to so-called "charge error" in allegedly not following the dictates of *Scindia*. Specifically, the contention is that Justice Greenfield erred in allegedly charging that the petitioners had a duty to warn of the danger that lurked in the hold *without* also charging that the duty was *not* operative where the petitioners had reason to believe that the stevedore employer (United Terminals Inc.) would "*anticipate*" the danger.

In point of fact, Justice Greenfield did not charge as alleged. As demonstrated below, he allowed the jury to define the duty based upon custom and practice (A3015-16), as specifically authorized by *Scindia* (451 U.S. at 176, 179-80). But, even absent contrary custom and practice,, the fact is that *Scindia* in no way establishes the qualified duty contended for by petitioners. Simply put, the formulation of duty proffered by petitioners has *no* application where the vessel interests *create* a hidden, highly dangerous condition, and fail to provide adequate warning or adopt other measures designed to safeguard the lives of the men who must encounter that condition. *That* is the teaching of *Scindia* (451 U.S. at 167, 175-76), and the rule has been reaffirmed by many courts in many jurisdictions in decisions coming *after Scindia*. We discuss this in detail below.

Furthermore, there is absolutely *no* authority which even suggests that the exculpatory language favored by petitioners has

any application to Seatrain, the terminal operator. In fact, petitioners now concede that the charge below was correct "if Seatrain were not a §905(b) 'vessel' " (p. 18). And there is absolutely no authority which would convert a terminal operator into a "vessel" for these purposes.

The fact is, as we point out below, that the duty incumbent upon Seatrain was either the General Maritime Law standard of "reasonable care under the circumstances", *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), or the New Jersey rule of "ordinary care to render the premises reasonably safe for the purposes embraced in the invitation." *Piro v. Public Service Electric & Gas Co.,* 103 N.J. Super. 446, 247 A. 2d 678, 682 (1968), *aff'd,* 53 N.J. 7, 247 A. 2d 667 (1968). Thus, even if petitioners were somehow correct in their construction of 33 U.S.C. §905(b) as it applies to shipowner Denholm, the concession with respect to joint tortfeasor Seatrain assures that respondents will recover all the jury awarded them. This provides yet another reason why this case lacks importance for this Court.

Finally, petitioners incorrectly argue that there was charge error because the jury was informed not to consider taxes (A3052). Without discussing the merits of the issue, suffice it to point out that petitioners offered absolutely no proof on the subject of taxes and, thus, there was no foundation for the deduction which they prefer. *Fannetti v. Hellenic Line, Ltd.,* 678 F. 2d 424, 432 (2nd Cir. 1982). In his decision below, Justice Greenfield took appropriate cognizance of the "state of the proof" on this issue (A14).

STATEMENT OF THE CASE

The story begins in Bremerhaven, Germany, where the Seatrain interests loaded four 20 foot containers in the hold of the ASIALINER for the first time (A169, A886, A1208). Previously, all 20 footers had been carried on deck (A1208) where their dimensions are fully visible. The loading in Bremerhaven was supervised by Mr. Anthony Shute-Henderson, Operations Manager for Seatrain GMbH (A420), a subsidiary of the Seatrain defendant (A422). Four 20 foot containers were stowed above deck on the hatch covers for Bay 10 (A147). Henderson testified that all of the 20 footers could just as easily have been stowed above deck (A450). Nonetheless, four of them were placed at the bottom level of Bay 10 (Exhibit 23, RA53)*, even though Henderson did not know whether or not Seatrain had a 20 foot spreader or other appropriate equipment for discharging these containers at their ultimate destination in Weehawken, New Jersey (A451).

In fact, New York (Weehawken) did not have the capability of handling 20 foot containers below deck (A101) because there was no 20 foot spreader available (A140) and because the center twist locks had been removed from the operational 40 foot spreaders (A104-5). These locks would engage the adjacent corner castings (Exhibit 16, RA51) of abutting 20 foot containers, so that such a tandem could be lifted as a unit in a single "pick". Petitioners contend that the spreader was "designed to lock into the four corner castings on the upper surface of one container of like [40 foot] dimension" (p. 5), but the fact is that Seatrain removed these center twist locks in 1971, because the maintenance was expensive and time consuming (A217-18). This was

---

* References preceded by "RA" are to pages in the Respondents' Appendix filed with the New York Supreme Court, Appellate Division—First Department.

unfortunate — if the center twist locks had remained in place there would have been no accident (A139-40).

Denholm's Chief Mate James Fowler was present when the four 20 foot containers were loaded in Bremerhaven (A476-77). He testified that the 20 footers on deck had been stowed in pairs, end to end, and *locked* to single 40 foot flatracks (Exhibit 11b, RA49) underneath (A1161-62), allowing the pairs to be discharged as one unit by a 40 foot spreader (A1205-6). However, the 20 footers which were loaded at the bottom of the hold were set in place piece by piece, with the flatrack landed first and then the two 20 footers on top (A477-78). Because the containers were not locked to the flatrack before being loaded into the hold they could no longer be locked prior to discharge. This was due to the fact that the cell guides (vertical steel members into which all containers below deck are stacked) were positioned so close to the corners of the containers that the flatrack locks could not be activated (A313-14, A1175). Obviously, if the 20 footers had been locked to the flatrack *before* loading the disaster in Weehawken would have never occurred. Petitioners claim that "the practice at Bremerhaven was never to handle 20 foot containers two at a time locked to a flatrack [463-4A]" (p. 9), but the page cited in no way supports the claim.

Chief Mate Fowler also testified that the 20 footers could have been stowed above deck as easily as below (A1168). And as the senior cargo officer aboard the vessel he certainly had the authority to tell the German longshoremen where to place the cargo (A580). Captain Robert Hopkins, a licensed British Master (A536), testified that the ship's officers have the right and the duty to tell loading longshoremen to either lock below deck containers to a flatrack or "take it out of there" (A582).

Petitioners argue that a flatrack is not intended to be used as a device to enable a 40 foot spreader to safely lift two 20 foot containers (p. 10), but this contention certainly foundered upon the explicit testimony of the ASIALINER's Master, Captain Munro, who stated that the 20 footers were carried locked to the flatrack because it was the "intention" to discharge them as a single unit (A1207). But there is more. Petitioners' witness, Mr. Arthur Mitchell, was quite definite — if the 20 foot containers are locked onto the flatrack "you can lift it up as one unit with no problem" (A926). The crane operator, Walter Slapkowski, noted that "the reason they had these flatracks, and locked to the flatrack are two 20 foot containers, is to pick up the whole unit, the two 20 footers, and the flatrack in one lift." (A137). And Captain Hopkins was clear about the fact that the "purpose" of the flatrack "is to tie both these containers as one unit." (A565).

Chief Mate Fowler admitted that he knew the 20 footers below deck were unlocked (A1163). Notwithstanding the obvious danger in attempting to lift two unlocked 20 foot containers with a 40 foot spreader, *Fowler provided absolutely no warning of this condition in the cargo plan, the log book, or otherwise* (A1163-64). And as Chief Mate, he had to approve the vessel's cargo plan (Exhibit 23) before sailing (A1167-68). But his derelictions did not end there. Upon arrival in New York, Fowler did not inform the Seatrain representatives or anyone else that the below deck 20 footers were unlocked (A1165), even though he had no reason to believe that the spreader gear at Weehawken could cope with this situation (A1180).

The truly wanton aspect of Fowler's negligence becomes apparent when one realizes that small metal implements called "stacking devices" (Exhibit 18a, RA52) could have been utilized to prevent the accident. These devices, when placed in the container corner castings, serve to block the spreader locks and prevent

a lift (A110). In fact, if the corner castings are blocked, the red "go" light in the crane cab will not activate, and the crane operator will not even attempt the lift (A111, A169). When this happens, the practice is to notify the ship's mate, who then lowers "cluster lights" into the hold to see what the problem is (A403-4). Unfortunately, Fowler did not utilize this simple "fail-safe" procedure.

While the ASIALINER made its way across the Atlantic, the vessel's cargo plan was air mailed to Seatrain's headquarters in Weehawken (A991-92). Copies of the plan were provided to Mr. Arnold Johnston (A999-A1000) who was Seatrain's Marine Operations Supervisor (A944-45). Johnston was in charge of the actual loading and discharging operations at Port Seatrain. He decided what work was to be done and how it was to be done (A946). As Johnston described it, he was the "immediate supervisor" of the stevedore hatch bosses (A987). The hatch boss of respondents' gang was Arthur Mitchell (A867).

From the cargo plan, Johnston was able to tell that there were four 20 foot containers below deck (A999-A1000). ***But Johnston was not told whether or not the 20 footers in question were locked, and he did not inquire (A969-70),*** even though he had a rapport with the ship's officers (A989) and talked to Chief Mate Fowler on the day discharge operations began at Port Seatrain (A1067-68).

Johnston talked to Mitchell and gave him copies of the cargo plan (A869). Johnston claims to have told Mitchell that four 20 foot containers were located below deck (A956-57). He was allowed to testify as to Mitchell's out-of-court statement that "I'll see what to do with those when I come to them" (A956-57), a statement which Mitchell did *not* confirm during *his* testimony for petitioners. Most importantly, however, ***Johnston conceded that he did not provide Mitchell with any information respecting***

the locked/unlocked status of the containers (A972), even though neither Mitchell nor any of the longshoremen at Port Seatrain, Weehawken, had ever encountered any 20 footers below deck. Petitioners now *concede* the lack of a warning (p. 7), arguing that it makes no difference.

Discharging began during the day on April 19, 1976, and continued well into the night. It was dark by the time the respondents' gang started on the containers inside Bay 10. Each bay has 9 cells, running from port to starboard, filled with stacks of containers. One of the vessel's cargo officers arrived when the hatch covers were opened and told the crane operator, Slapkowski, to begin with cell no. 4 (A149-52). Slapkowski then discharged five 40 foot containers, moving deeper and deeper into the hold (A155). *All witnesses* agreed that there were no lights in the hold (A168, A398, A812), and respondent Introna said that the interior of cell no. 4 was dark "like a cemetery" (A811).

When Slapkowski reached the deepest level of the cell, he lowered the spreader on top of what he thought was a 40 foot container and lifted (A153-55). As the containers began to emerge from the cell guide Slapkowski saw a split down the center and realized that he had lifted two 20 footers (A156). He immediately threw the controls into a stop position, and then a down position, but momentum carried the containers clear of the confines of the cell (A156). If the center twist locks had still been operative, as intended by the manufacturer, he could have engaged them at that time and prevented the containers from splitting away (A326). The center twist locks would have only required a half second to activate (A1253).

It was now too late to avert disaster. The containers weighed 14 tons apiece (A11), and the one on the right broke off and fell to the bottom of the bay (A156). The container on the left swung down but did not break off, causing the spreader to careen wildly

about, striking the containers stacked atop Bay 9 and Bay 11 (A157-58) and grievously injuring the respondents.

There were no ship's officers present on deck in the vicinity of Bay 10 during the entire discharge operation (A145), except for the cargo officer who stopped by and told Slapkowski to begin in cell no. 4 (A151-52). This officer was third mate Thomas (A474, A1209). He immediately left the scene and no one else appeared thereafter to provide supervision (A162).

All of this was consistent with the typical procedure aboard the ASIALINER — the officers were often present during the day but "after it got dark they disappeared." (A170). Slapkowski testified that this was not the practice on *other* container vessels (A177).

Captain Hopkins testified that the officers on the ASIALINER departed from accepted custom and practice in several major respects. In the first place, it is standard procedure to indicate on the cargo plan that a dangerous condition (such as unlocked 20 foot containers) exists below deck (A560-62). A notation such as "see Chief Officer prior to discharge" should appear on the document (A566) if only "for the sake of safety." (A566).

Furthermore, when containers are loaded, the Captain must assure that they are properly locked to their flatracks (A631, A651). It is also the custom and practice aboard container vessels for the ship's officers to be present on deck when cargo is handled to see that the job is properly done and all safety precautions are taken (A578). Hopkins stated that "as long as the cargo is being worked you must have a duty officer on the deck of that ship", and "it makes no difference" if an independent stevedore has been hired to provide the labor (A590). The Captain has clear authority to direct the stevedore with respect to discharge procedure

(A589). Petitioners provided no testimony or other evidence to controvert respondents' proof on this score.

Both of the 20 foot containers in question contained hazardous cargo, but the officers of the ship were unaware of this until after the accident (A3136, A3132). Neither container was listed on the hazardous cargo manifest (A1212-13) as required (A568). Petitioners argue that this demonstrates lack of notice (p. 9), but the point is that ship's officers *should* know when hazardous cargo is in the hold. Captain Hopkins testified that the obligation of the officers to be present on deck is even greater when hazardous cargo is being worked (A595). But petitioners' witness Mitchell conceded that the officers on Seatrain container vessels "very seldom" supervised the handling of hazardous cargo, as distinct from the practice on general cargo ships (A902). And this was so notwithstanding a Coast Guard Regulation (46 C.F.R. §146.02-17) which read, at the time of the accident, as follows:

> "Explosives or other dangerous articles or substances as cargo shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty . . . . For foreign vessels such person shall be an officer of the vessel assigned to such duty by the Master of the vessel."

As mentioned above, it was as "dark as a cemetery" in cell no. 4 of Bay 10. Petitioners contend differently, but the truth of the matter was perhaps best reflected in the statement provided by Chief Mate Fowler, wherein he noted that he and Captain Munro examined the damage to the container at the bottom of the hold "from deck level only due to the relatively poor lighting available." (A3137).

Slapkowski also said that there was no lighting in the cell (A168), and another crane operator, one Sergio Germinario, testified that he had never seen any lights in the hold (A398) and that there were no lights above the deck level which illuminate the lower levels (A398). Petitioners try to convert this into a condition which was created by the stevedore *after* commencement of cargo operations (p. 13), but the fact is that their own witnesses, Johnston and Mitchell, "did not recall" whether "there was provision for ship's lighting in the cell of the bay." (A886-87, A976). Both agreed that the petitioners had the duty to provide such lighting (A917-18, A1114). All cargo ships carry flood or "cluster" lights (A614), and it would seem to have been a simple matter for the crew to hang these in the hold. But it was not done.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT CORRECTLY CHARGED THE JURY RESPECTING PETITIONERS' DUTY.

Petitioners assign error in the charge. They contend, on the authority of *Scindia*, that they had absolutely no duty to warn the plaintiffs or the stevedore of the hidden danger which Denholm had *created* in the dark recesses of the hold. They say this is so because they were entitled to assume that the stevedore would "anticipate" the danger and avoid it. This is wrong on the law and the facts.

A. The Duty of Seatrain

Scindia was a case about a shipowner's duty under §905(b) of the 1972 Longshoremen's Act (33 U.S.C. §§901 *et seq.*). But the duty described by *Scindia* can only apply to the potential defendants enumerated in that Act. Section 905(b) relates to a

longshoreman's cause of action against a "vessel", the definition of which appears in §902(21):

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice,* agent, operator, charterer or bare boat charterer, master, officer, or crewmember."

Although petitioners have sometimes asserted that Seatrain was a time charterer [arguably a "charterer" for purposes of §902(21)], the fact is that neither party proved that Seatrain came under the Act, as petitioners' attorney enthusiastically pointed out at trial (A2822-23).

Respondents *did* prove that Seatrain was the "terminal operator", in total control of all activity at Port Seatrain (A341-42, A906). And the charge to the jury herein dealt with Seatrain as a "terminal operator" (A3024), defining its duty to the respondents as follows:

> "As a matter of law, however, I will advise you that Seatrain would have an obligation to notify the stevedoring company and personnel as to the existence of any dangerous condition which they knew about or should have known about." (A3027).

We submit that this charge accurately described the duty of a "terminal operator" to business invitees, such as the respondents. It is not disputed that a "terminal operator" is not a "vessel" for purposes of §902(21) of the Longshoremen's Act. And a terminal operator's duty herein can only be defined by the law

of New Jersey or the law of admiralty — there are no other options.

Petitioners might have contended that New Jersey law controls, inasmuch as Johnston's failure to warn occurred on land. *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971). But they would find little comfort here, because the duty of New Jersey owners and occupiers of land to business invitees is more stringent than that imposed by Justice Greenfield upon Seatrain herein. Not only is there a duty to warn but, additionally, a duty to "make safe". *Piro v. Public Service Electric & Gas Co.,* 103 N.J. Super. 456, 247 A. 2d 678, 682 (1968), *aff'd,* 53 N.J. 7, 247 A. 2d 667 (1968).

Alternatively, petitioners might have claimed that Seatrain's duty must be defined under maritime law since the culmination of the tort was upon a vessel resting in navigable waters. But there is no help here either. When a maritime defendant owes no *special* duty to the plaintiff under a particular statute (e.g., the Jones Act or the 1972 Longshoremen's Act), the standards to be applied on a negligence cause of action are governed by the General Maritime Law. The standard of care under the General Maritime Law is "reasonable care under the circumstances", as set forth in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959).

The charge delivered by Justice Greenfield respecting the duty of Seatrain (A3027) defined "reasonable care under the circumstances", the "circumstances" here being that Seatrain either knew or should have known of the dangerous condition in the hold of the ASIALINER. Thus, if maritime law is applicable to Seatrain, then Justice Greenfield's charge served to properly tailor *Kermarec* to the particular facts of this case. On the other hand, as noted above, if New Jersey law governs, then Seatrain received the benefit of a more favorable charge than was warranted, and cannot be heard to complain. In fact, neither

Seatrain nor Denholm *ever* complained about the charge on the question of duty — no exceptions were taken thereto (A3066-73, A3079-91).

B. The Duty of Denholm

It is conceded that Denholm was the "operator" of the ASIALINER (p. 4). The term "vessel" includes "operator" under §902(21) of the Act, and, therefore, the holdings with respect to duty in *Scindia* are applicable to Denholm. Petitioners further concede that Denholm did not warn the respondents or the stevedore of the danger, arguing, on the authority of *Scindia*, that this was not necessary. The legal claim is that a shipowner has no duty to warn of hazards which would be "anticipated and avoided by a non-negligent stevedore." (p. 14). And, say petitioners, Justice Greenfield did not inform the jury of their version of the law.

As we now demonstrate, petitioners' "law" is fanciful, and there is no authority for it where the vessel interests have *created* the very condition that causes the damage. In such a case, the duty to warn is absolute. As Justice White of this Court said in *Scindia:*

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; *and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.*" (451 U.S. at 167) (emphasis added).

Further on in Justice White's opinion, the following appears:

> "Yet it is quite possible, it seems to us, that Seattle's [the stevedore's] judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.*" (451 U.S. at 175-76) (emphasis added).

We submit that a reading of *Scindia* makes it abundantly clear that a vessel's duty to warn with respect to "hidden dangers" which "existed from the outset" is not qualified by any permission to rely upon the stevedore to uncover those dangers. To the same effect is *Lemon v. Bank Lines, Ltd.*, 656 F. 2d 110 (5th Cir. 1981). The plaintiff longshoreman therein was injured during discharge operations by a collapsing cargo stow. The Fifth Circuit first noted the shipowner's duty, under *Scindia*, "to at least warn the stevedore of hidden danger. . . ." (656 F. 2d at 115), and then went on to say that:

> "*The shipowner is therefore responsible for eliminating dangerous conditions which exist at the outset* of the stevedoring operations, *id.* at 1621-22, but has 'no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operation.' " (656 F. 2d at 115) (emphasis added).

And where the dangerous condition is *created* by the vessel, *Lemon* states in unequivocal terms that the *Scindia* duty to warn is *absolutely unqualified* by any reliance upon the stevedore's ability to discover and avoid:

> "However, in light of *De Los Santos [Scindia], considerations of the stevedore's awareness of and degree of control over a dangerous situation are irrelevant when the existence of the dangerous condition is attributable to the negligence of the shipowner.*
>
> * * *
>
> The Supreme Court clearly established that *the ability of a longshoreman to recover cannot turn on who was in the best position to recognize and remedy a dangerous condition when that condition was created by a vessel owner* who knew or should have known of its existence prior to the stevedore's operations. The Court specifically imposed a duty on the shipowner to at least warn the stevedore of any dangerous condition, existing at the outset of the stevedoring operations, of which the shipowner should have been aware through the exercise of reasonable care." (656 F. 2d at 116) (emphasis added).

Standing for the same proposition are *Helaire v. Mobil Oil Co.*, 709 F. 2d 1031, 1036 (5th Cir. 1983); *Stass v. American Commercial Lines, Inc.*, 683 F. 2d 120, 122 (5th Cir. 1982) and *DiRago v. American Export Lines, Inc.*, 636 F. 2d 860, 868-69 (3rd Cir. 1981), *cert. denied*, 449 U.S. 890.

Petitioners attempt to circumvent all of this authority by arguing that the inadequate lighting and the failure to supervise discharge of hazardous cargo were "conditions" that arose *during* discharge operations (p. 13). But the attempt is transparent. The failure to *install* and *design* adequate lighting in the hold was permanent (A398, A886-87, A917-18, A976, A1114), and the failure to supervise related to the pre-existing hidden condition of hazardous cargo in the hold.

Another post-*Scindia* case which is particularly relevant on the facts is *Turner v. Japan Lines, Ltd.*, 651 F. 2d 1300 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 294. The plaintiff longshoreman therein was injured while discharging cargo improperly stowed by independent foreign stevedores, and the Ninth Circuit held that the shipowner had an absolute duty to warn or correct:

> "The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. *As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore.* We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least,

> no practical remedy. *We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.*" (651 F. 2d at 1304) (emphasis added).

Petitioners apparently argue that their responsibility herein was non-existent because the area of the accident was "under stevedore control" (p. 14). Query what effect "control" has in this regard, after *Scindia*, where the shipowner created the dangerous condition and it existed prior to "turn over" of the area to the stevedore. *Lemon, supra*, 656 F. 2d at 116; *Subingsubing v. Reardon Smith Line, Ltd.*, 682 F. 2d 779, 780 (9th Cir. 1982); *DiRago v. American Export Lines, Inc.*, 636 F. 2d 860, 868-69 (3rd Cir. 1981), *cert. denied*, 449 U.S. 890. In any event, it is absurd to claim that the unlocked 20 footers, lying in the depths of the darkened hold, could in any meaningful way have been under the "control" of the stevedore. The pre-*Scindia* cases required a showing that the area in question had come under the "exclusive control" of the stevedore before legal responsibility could pass. *Barulic v. French Lines*, 75 A.D. 2d 761, 427 N.Y.S. 2d 815, 817 (1st Dept. 1980), *cert. denied*, 451 U.S. 908 (1981); *Sarauw v. Oceanic Navigation Corp.*, 622 F. 2d 1168, 1172 (3rd Cir. 1980).

Petitioners' legal objections to the jury charge die for simple lack of authority. But even if this were not so clearly true, it would be of no moment. This is because Justice Greenfield's charge was correct under *Scindia* for entirely *independent* reasons. Indeed, as demonstrated immediately above, the instruction regarding Denholm's duty to warn was entirely appropriate inasmuch as the vessel created the danger, but, in point of fact, Justice Greenfield did not describe an unqualified duty. What he *did* was to instruct the jury that it was in its province to determine the

extent of the duty; *i.e.*, did Denholm have a "continuing obligation" to supervise loading and discharge or was it, in fact, entitled to rely upon the expertise of the stevedore. As Justice Greenfield put it:

> "So, I will ask you first to focus on the question of the responsibility of Denholm, i.e., the ship personnel. *Was there a continuing obligation on the part of the ship's officers of Denholm to supervise the loading and handling of cargo? Is that something that they had a responsibility for or was their responsibility discharged once they said to the stevedore, 'You undertake to load and unload and we have nothing further to do with it.'* " (A3015-16) (emphasis added).

The jury herein was fully empowered to make a finding of "continuing obligation" and the authority for that is, once again, none other than *Scindia*. All three *Scindia* opinions (White, Brennan and Powell) stated that the duty defined therein could be overridden by specific "custom and practice" to the contrary (451 U.S. at 176, 179-80).

Respondents herein presented copious testimony on the custom and practice relating to discharge operations on container vessels. As noted above, Slapkowski testified that the practice on *other* container vessels was that "the cargo officer was always present when we were working the hatch." (A177). Captain Hopkins stated that the custom and practice aboard container vessels is for the officers to be present on deck when cargo is handled to see that the job is properly done and all safety precautions are taken (A578). He went on to say that "as long as the cargo is being worked you must have a duty officer on the deck of that ship", and "it makes no difference" if an independent stevedore has been hired to provide the labor (A590).

Petitioners were not able to rebut respondents' proof in any way (*see* A997, A1211). Thus, a jury finding that Denholm had a "continuing obligation to supervise" was fully warranted upon the proof adduced. And the finding of such a duty, based upon custom and practice, is supported by many authorities, both before and after *Scindia; e.g., Turner, supra,* 651 F. 2d at 1305.

Furthermore, petitioners' entire "legal" argument that they were entitled to "anticipate" that the stevedore would discover or avoid the danger lurking in the unlit hold is ultimately premised upon the *factual* claim that there was some sort of "practice" of unloading 20 foot containers at Weehawken one by one with "wires" (*e.g.*, pp. 6, 10, 16). But there is nothing to this. It is probably enough to point that there *could* be no "practice" with respect to 20 foot containers below deck inasmuch as they had never been stowed there before (A313, 315-16).

Petitioners' witness Mitchell is the source of "practice" evidence respecting the "wire" method (p. 10), but this source was less than solid. At one point, Mitchell *thought* that 20 foot on-deck containers "weren't taken off with one pick" (A894) [and petitioners adopt that claim here (p. 6)], but later, when confronted with the fact that Mr. Conversano's longshore gang *had* removed on-deck 20 footers while locked to their flatracks (A3135), Mitchell conceded that Conversano could have done this "if eight corners were locked in" (A925). In response to a question from the Court, Mitchell stated that "you can lift it up as one unit with no problem, sir." (A926).

In any event, there was nothing left to petitioners' "wire practice" after respondents read the explicit testimony of the vessel's own Captain Munro:

> "Q. When they were carried on deck, the containers were locked to the flatrack? A. Yes.

> That was the intention of on deck. *They were discharged that way.*
>
> Q. And they were discharged as one pick; you know what I mean? A. *That was the intention, yes."* (A1207) (emphasis added).

Also relevant in this regard is the accident report prepared by respondents' employer, United Terminals Inc., in which the following appears:

> "Crane operated by Walter Slapkowski was removing container units from center cell of no. 10 hatch, *two 20 foot units not connected at the bottom with special racks designed for lifting as one 40 foot unit* allowed the two units to split when they cleared the cell." (A3125) (emphasis added).

II.

THERE WAS NO ERROR IN THE CHARGE RESPECTING DAMAGES.

Petitioners *now* complain that the jury was not instructed to deduct income taxes (pp. 18-19), citing *Fanetti v. Hellenic Line, Ltd.*, 678 F. 2d 424 (2nd Cir. 1982) as authority. Without discussing the merits of *Fanetti*, it is enough to set forth the following language from that case:

> *"But Hellenic, unlike the defendant Liepelt, offered no evidence to establish what amount of future taxes plaintiff would have incurred.* Hellenic did not seek a stipulation from plaintiff on the point before resting its case. While plaintiff's more recent tax returns had been received in evidence

> to prove his past earnings, Hellenic did not indicate before the evidence closed that it would rely on those returns to quantify future taxes, thereby depriving plaintiff of an opportunity to offer his own evidence, expert or otherwise, of what his future taxes might be. *For that reason we reject Hellenic's argument that the trial judge should have instructed the jury on the basis of the past tax returns, or use them to make future tax calculations herself.*" (678 F. 2d at 432) (emphasis added).

In the same fashion, petitioners herein offered no proof on the subject of taxes, obtained no relevant stipulation, did not proffer income tax returns, and did not even ask the expert witness, Dr. Berenson, for his opinion on the subject of income taxes. Thus, there is absolutely no foundation for arriving at a net award in this case. In his decision below, Justice Greenfield took appropriate cognizance of the "state of the proof" on this issue: "In any event, the defendants offered no proof of any facts which would give the jury an alternative mode of calculation." (A14).

Petitioners attempt to surmount their fatally deficient record in this regard by now claiming that Justice Greenfield "ruled as a matter of law that tax liability could not be proven. . . ." (p. 19). Justice Greenfield did no such thing. At the page of the transcript cited by petitioners (A2566) it will be observed that the Court received a note from a juror "about the effect of income taxes." (emphasis added). He then declared that "I will not put the question to the witness [Dr. Berenson]" [A2566), and this was certainly proper. The question did not relate to a hypothetical *amount* of taxes, but rather to the "effect" of taxes. This is a legal question which Dr. Berenson was not competent to answer, and Justice Greenfield went on to say that, at the proper time, he would instruct the jury on the subject. The Court's comment

was *solely* in response to the juror's note, was not directed at defense counsel in any way, and did not occur during the defense's cross-examination. Justice Greenfield certainly did not prohibit defense counsel from attempting to ascertain what the plaintiffs' taxes would be in the event that they might properly be taken into account. Furthermore, defense counsel did not object to the Court's comment or make any offer of proof at this point or anywhere else. And no exception was taken to the instruction not to consider the effect of taxes on lost future wages (A3052).

CONCLUSION

For all of the reasons discussed above, petitioners' application for a writ of certiorari should be denied.

Dated: New York, New York
March 28, 1984

Respectfully submitted,

KENNETH HELLER
Attorney for Respondents

FRED R. PROFETA, JR.
Of Counsel

No. 83-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEATRAIN LINES, INC., and
J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

—against—

JOHN CARCICH, PASQUALE INTRONA
and VINCENZA INTRONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

REPLY OF PETITIONERS SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD.

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700

Attorney for Petitioners

WALKER & CORSA
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY OF PETITIONERS SEATRAIN LINES INC. AND J & J DENHOLM MANAGEMENT, LTD. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION - FIRST DEPARTMENT

In this longshoremen's personal injury action five claims of liability of the shipowner, J & J Denholm Management, Ltd. and terminal owner, Seatrain Lines, Inc. were submitted to a jury which returned a general verdict. These were:

1. That the presence underdeck of two 20 foot containers not locked to a flatrack "created a dangerous condition" for which defendants might be liable, because of having created the condition, or failing to warn the stevedore of its existence [24A-25A]*;

2. That since ship's officers knew or should have known of the presence of "dangerous substances" in the 20 foot containers about to be unloaded they had the

---

* Reference followed by the letter "A" are to page numbers of the Appendices to the Petition for Writ of Certiorari previously filed.

obligation imposed by regulation to be personally present observing the manner of "handling" of the cargo, which might "have made a difference" [26A-27A];

3. That since the attempted discharge of the two 20 foot containers by "a single pick" could have been "prevented" by the expedient of blocking an appropriate corner casting of one of the 20 foot containers with a so-called "shear key" and, hence, making it "physically impossible to make that single pick," defendants could be found negligent for not adopting this "alternative method in (sic) which this accident could have been prevented" [28A];

4. That had there been adequate lighting, and "[if] one of the parties who could have supplied...[it] was shipboard personnel, by either switching on the lights or by rigging portable lights; that [if] the failure to do that contributed to the happening of the accident," defendants could be liable [28A-29A];

5. That defendants could be found liable in the event "those center twist locks, which were originally part of the equipment on that spreader, had been on the spreader

on the date of the accident, the crane operator could have activated them and possibly have locked into the centers... [in time to have] prevented the containers from falling" [31A].

Argument

In opposition to this petition, respondents urge that no federal right can be shown to have been infringed in the proceedings in the courts of the State of New York. This argument is predicated upon the assertion that questions of fact prevent this Court from assessing the legal issue, and for this reason the $3,500,000 judgment in respondents' favor cannot be reviewed.

The law of the State of New York, with respect to whether a new trial must be granted, in a case where a general verdict has been returned, if but one of the theories of liability submitted to the jury is found untenable, is the same as the federal law: in such event, a new trial must be granted. See Sobel v. City of New

York, 9 A.D.2d 271 (1st Dept. 1959); Carroll v. City of New York, 37 Misc. 2d 563 (S.Ct. Bx. Cty. 1962) aff'd, 25 A.D.2d 841 (1st Dept. 1966). See also, Bollenbach v. United States, 326 U.S. 607 (1946); Evans v. Transportacion Maritime Mexicana, 639 F.2d 848 at 860 (2 Cir. 1981). Moreover, under the law of the State of New York, where the charge with reference to the issues and the applicable law is so inadequate as to preclude fair consideration by the jury of the issues, the judgment must be reversed and a new trial ordered. U.S. Vitamin & Pharmaceutical Corporation v. Capital Cold Storage Company, Inc., 21 A.D.2d 661 (1st Dept. 1964); Eisner v. Daitch Crystal Dairies, Inc., 27 A.D.2d 921 (1st Dept. 1967).

There is no question that there were disputed factual issues, principally having to do with the suggestion by respondents that the flatracks were designed for purposes other than securing cargo, and, in fact, were "intended" to allow two 20 foot containers to be lifted as a single unit by a 40 foot spreader. But the existence of this issue does not deny this Court opportunity for review

and, indeed, the requirement that each issue of liability be independently sufficient establishes beyond doubt that the courts of the State of New York failed, by holding that all respondents' claims were legally sufficient, to follow the federal law with respect to "third-party" liability in a 33 U.S.C. §905(b) case laid down in Scindia Steamship Navigation Co. v. De Los Santos, 451 U.S. 156 (1981).

As an example, respondents' claim of liability expressed in paragraph (3) above -- that the shipowner could be liable for not having fitted one of the corner castings of one of the 20 foot containers with a "shear key" and thus not adopting the trial court's "alternative method in which the accident could have been prevented" -- must itself, without consideration of the other claims of petitioners' negligence, have been found to be legally sufficient: if it was not, a new trial would have been ordered. For this reason, this Petition perfectly frames the wholly legal issue whether the New York courts correctly concluded that a charge allowing the jury to find a

shipowner liable to a longshoreman simply for failing to anticipate a negligent act by the stevedore properly supports an award of damages. Since the jury could have found that the stow plan description of the size and location of the underdeck 20 foot containers was adequate warning of any said-to-be dangerous condition (because 20 foot containers whether or not locked to a flatrack were, as a matter of terminal practice, always suppposed to be discharged singly), this shipowner, under the court's charge, could have been found liable on account of the absence of the "shear key" only if burdened with a duty to take all such steps, in anticipation of the stevedore's negligence (in failing to give the longshoremen working the hatch a copy of the perfectly adequate stow plan), so as to render conditions aboard ship accident-proof. This species of liability, common in products liability law, (see, Pastorello v. Koninklijke Nederl Stoomb Maats, 456 F. Supp. 882, 887 (EDNY 1978)) has absolutely no place in federal law governing longshoremen's cases since passage

of the 1972 Amendments to the Longshoremens' and Harbor Workers' Compensation Act. And this Court has so held.

As was specifically held in Scindia Steam Navigation Co. v.De Los Santos, supra (at p. 168), a shipowner cannot be liable on account of stevedore negligence. Whatever else, this must mean that although a shipowner can be found liable for failing to intervene when aware of the stevedore's "obvious improvidence," it cannot be liable simply because it failed to anticipate that such negligence might occur.

Since at least one improper "theory" of liability was presented to the jury as a basis for finding petitioners' liability -- one so obviously and recently proscribed by the controlling decision of this Court -- the Petition should be granted and the case remanded to the Appellate Division, First Department with instructions to follow federal law. For it is perfectly obvious that the courts of the State of New York, instead of following such law, applied the law of the State. This law (see e.g., Dole v.

Dow Chemical Corp., 30 N.Y.2d 143, 282 N.E.2d 288 (1972)) allows a third party to recover contribution from an employer which has paid what are, under the workmens' compensation statute applicable in New York, inadequate benefits. But under federal law these respondents' employer, this woefully negligent stevedore, recovers its compensation "lien" and is absolved (by virtue of the size of the verdict) of all future liability, for adequate compensation benefits, which would have otherwise been payable, had there been a proper charge, and hence, very likely a verdict in petitioners' favor. And this as a result of injuries unquestionably caused by stevedore negligence of the grossest kind.

Respectfully submitted,

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700

Attorney for Petitioners

WALKER & CORSA
Of Counsel